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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

PIKEVILLE UNITED METHODIST HOSPITAL OF KENTUCKY, INC. - *Petitioner*

versus

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC - - - *Intervenor*

AND

NATIONAL LABOR RELATIONS BOARD - *Respondent*

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit And Appendix

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the National Labor Relations Board ("NLRB" or "Board") in *Management Training Corp.*, 317 NLRB 1355 (1995), wherein the Board has announced its intention to exercise jurisdiction over contractors of exempt political subdivisions regardless of the degree of governmental control over the contractor's terms and conditions of employment, is consonant with the National Labor Relations Act ("NLRA"), as amended, 29 U.S.C. § 151, *et seq.*?

2. Whether *Management Training Corp., supra,* frustrates Congressional intent in that it will necessarily embroil exempt political subdivisions in the labor disputes of contractors whose finances, including funds allocated for payment of wages and benefits, are controlled by such political subdivisions?

3. Whether tension exists between *Management Training Corp., supra,* and the decision of this Court in *National Labor Relations Board* v. *E.C. Atkins & Co.*, 331 U.S. 398 (1947)?

4. Whether the NLRB and Court of Appeals are correct that this Court's definition of "political subdivision" as used in Section 2(2) of the NLRA, as amended, 29 U.S.C. § 152(2), as espoused in *NLRB* v. *Natural Gas Utility District of Hawkins County,* 402 U.S. 600 (1971), requires that the political subdivision retain the authority to appoint and remove the directors of its contractor in order for the contractor to share this statutory exemption from jurisdiction?

5. Assuming that the test announced in *Management Training Corp., supra,* is an invalid interpretation of the NLRA, as amended, whether the NLRB may permissibly focus upon a political subdivision's actual exercise of control under its prior test articulated in *Res-Care, Inc.*, 280 NLRB 670 (1986), as opposed to the political subdivision's right of control over the wages, hours, and other terms and conditions of employment of its contractor, in deciding whether or not to assert jurisdiction over the contractor?

6. Whether the NLRB may permissibly relitigate jurisdictional issues in connection with unfair labor practice allegations under the NLRA Section 8, 29 U.S.C. § 158, when those allegations antedate a refusal to assert jurisdiction in a contemporaneous representation case under NLRA Section 9, 29 U.S.C. § 159?

PARTIES TO THE PROCEEDINGS

The Petitioner is Pikeville United Methodist Hospital of Kentucky, Inc., a non-stock and non-profit corporation organized and existing under the laws of the Commonwealth of Kentucky. The Intervenor is the United Steelworkers of America, AFL-CIO-CLC, an unincorporated labor organization. Respondent is the National Labor Relations Board, an agency of the United States, created by Section 3 of the National Labor Relations Act, 29 U.S.C. § 153, and continued by the Labor Management Relations Act, 29 U.S.C. § 141, *et seq.*

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UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC - - - - *Intervenor*

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NATIONAL LABOR RELATIONS BOARD - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

On May 14, 1997, the Sixth Circuit Court of Appeals enforced, in part, the Final Decision and Order of the National Labor Relations Board affirming the Administrative Law Judge's Findings and Recommendations concerning Petitioner's commission of violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158(a)(1) and (3). The Court of Appeals Opinion of April 1, 1997 upon which Judgment was thereafter en-

tered, is not yet officially reported, but may be found at 154 LRRM (BNA) 2929 (6th Cir., April, 1997).[1] The NLRB's Decision and Order, and Administrative Law Judge's Findings and Recommendations, are reported at 318 NLRB No. 122, at p. 1 (1995).

JURISDICTIONAL STATEMENT

This Petition seeks review of the May 14, 1997 Judgment of the United States Court of Appeals for the Sixth Circuit enforcing, in part, a Final Decision and Order of the National Labor Relations Board pursuant to § 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(f). The Judgment of the Court of Appeals was entered following the April 1, 1997 issuance of its written Opinion. Petitioner's petition for Rehearing En Banc was denied by Order entered June 26, 1997.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Petitioner's claim is based on Sections 2(2) and 14(c)(1) of the National Labor Relations Act, as amended ("NLRA"), 29 U.S.C. §§ 152(2) and 164(c)(1). NLRA § 2(2) states:

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

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[1] Electronic Citation: 1997 FED App. 0109P (6th Cir.)

NLRA § 14(c)(1) reads as follows:

> (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedures Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of jurisdiction: *Provided,* That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

Also relevant to Petitioner's claim are NLRA §§ 8(a)(1) and (3), 29 U.S.C. §§ 158(a)(1) and (3) which state, in relevant part:

> *Sec. 8.(a)* It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;[2]
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .

Section 102.67(f) of the Rules & Regulations of the National Labor Relations Board, 29 C.F.R. Section 102.67(f),

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[2] NLRA § 7, 29 U.S.C. § 157 reads:

> Employees shall have the right to self-organization, or form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

is also pertinent to Petitioner's claim. That regulation states:

> The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related unfair labor practice proceeding.

STATEMENT OF FACTS AND OF THE CASE

A. The Petitioner's Relationship to The City Of Pikeville, Kentucky

Petitioner is a Kentucky corporation which operates a municipally-owned acute care hospital facility in Pikeville, Kentucky. Petitioner's authority to operate the facility derives from a Sublease Agreement entered into amongst Petitioner, the Pikeville Kentucky Public Hospital Corporation, and the City of Pikeville, Kentucky in July, 1969. (Appendix, item 10).

The Sublease Agreement was just one transaction involved in a complicated financing plan whereby the City, through the creation of an alter-ego corporation, the "Public Hospital Corporation", could permissibly secure public bond financing for the construction of the hospital facility. The details of the entire series of transactions are not material to consideration of the issues raised by the within Petition. They are, however, fairly accurately summarized by the Administrative Law Judge in his findings of fact pertinent to the bond issue. (Appendix, item 1).

Under the terms of the Sublease Agreement, Petitioner's contractual right to operate the hospital facility was for the initial one-year period ending June 30, 1972, and from "year to year" thereafter at the "exclusive option" of the

City, though not beyond July 1, 2009. (Appendix, item 10).

Petitioner's contract to operate the hospital facility is further contingent upon the City's renewal of a Contract, Lease and Option between the City and the Public Hospital Corporation and, at all times, otherwise subservient "to the directions of the City. . . ." (*Id.*).

Other specific limitations upon Petitioner's operation of the hospital facility, expressed in the Sublease Agreement, include: City approval of "rates for services and facilities to be charged" by Petitioner (*Id.*); Petitioner's deposit of "all funds and revenues" from hospital operations into a City "revenue fund account" subject to disbursement only as approved by the City in its annual approval of Petitioner's operating budget, and any City-approved revisions thereto (*Id.*); and, the expenditure of any excess revenues only as directed by the City, and limited to early bond redemption, capital improvements to the hospital facility, or enhancement of the "services and/or facilities of the hospital." (*Id.*).

The Sublease Agreement between Petitioner and the City "is in all respects subject to and subordinate to the Contract, Lease and Option between the [Hospital] Corporation and the City." (*Id.*).

The Sublease further provides that the Petitioner's annual budget, requiring City approval, include "all wages and compensation of operating personnel, . . ., insurance and workmens compensation . . . premiums." (*Id.*).

In the eighteen years following the City's review and approval of the Petitioner's initial operating budget, formal City action thereon was not again taken. During this time, however, the Chairman of the Public Hospital Corporation Board, appointed by action of the City Commission, served concurrently as Chairman of Petitioner's Board of

Directors. Until 1990, all members of the Public Hospital Corporation Board of Directors served concurrently on the Hospital's Board of Directors.

B. The 1990 Organizing Campaign At The Hospital And Proceedings Thereon

Beginning in the Summer of 1990, and continuing through the July 3, 1991 Decision and Order of the Acting Regional Director of the NLRB's Ninth Region which dismissed its election petition, the Intervenor, United Steelworkers of America, AFL-CIO-CLC ("Steelworkers"), conducted a vigorous campaign to organize workers at the hospital facility.

The campaign resulted in a number of unfair labor practice charges being filed against Petitioner, involving allegations of wrongdoing by Petitioner's agents between the onset of organizing activity and November 8, 1990. Although its November 20, 1990 Answer to the first of three Complaints and Consolidated Complaints admitted that Petitioner was an employer within the meaning of Section 2(2) of the Act, 29 U.S.C. § 152(2), Petitioner contested jurisdiction at the outset of a unit determination hearing begun on December 5, 1990, and filed an amended Answer to the Complaint on January 3, 1991 wherein jurisdiction was likewise contested.

The unit determination hearing which commenced in December, 1990 was in response to the Steelworkers' October, 1990 Petition filed pursuant to Section 9(c) of the Act, 29 U.S.C. § 159(c), and assigned Case No. 9-RC-15808. During the conduct of those proceedings, the City took steps to assert rights which concededly, had not been exercised by formal City action for many years.

Thus, on January 14, 1991, the City Commission approved a Resolution wherein, pursuant to its authority under the Sublease, it directed Petitioner to refrain from entry

> ". . . into any contract of employment, whether individually extended or collectively bargained, [or to] modify wage rates, hours of work or any employee benefit, whether pursuant to a written plan or practice, without the express written consent of the City . . ." (Appendix, item 11).

Thereafter, on February 25, 1991, the City Commission approved another Resolution which, pursuant to its authority retained in the Sublease, directed Petitioner to amend its Articles of Incorporation and By-Laws to, *inter alia*: remove all reference to the Petitioner's religious mission as an adjunct of its operation of the hospital facility; remove the requirement of Methodist church membership pertaining to the selection of certain members of the Board of Directors and the hospital administrator; and, remove references therein to the religious emphasis activities as part of the operation of the hospital facility. Petitioner complied. (Appendix, items 13 and 14).

On July 3, 1991, the Acting Regional Director for the NLRB's Ninth Region entered his Decision and Order in the representation case, 9-RC-15808. The Decision and Order dismissed the Steelworkers' petition for representation on grounds that "the City now acts in a controlling rather than advisory capacity with respect to wages, benefits and personnel policies." (Appendix, item 4). The Acting Regional Director rejected Petitioner's claim that it was entitled to share the Section 2(2) exemption of the City in that it was neither a "governmental agency", nor was it "an entity administered by individuals responsible to public officials. . ." (*Id.*)

Between the close of unit determination hearings and issuance of the Acting Regional Director's Decision and Order, the unfair labor practice proceedings, scheduled for hearing to commence on March 4, 1991, were postponed. By Order of February 5, 1991, the Acting Regional Direc-

tor postponed the hearing "pending consideration of the jurisdictional issue raised in Case 9-RC-15808." (Appendix, item 6).

Notwithstanding the Acting Regional Director's dismissal of the election petition on jurisdictional grounds in his July 3, 1991 Decision and Order, and the NLRB's denial of the Steelworkers' Request for Review of that action,[3] the Acting Regional Director issued an August 13, 1992 Order Rescheduling Hearing in the unfair labor practice proceedings, to commence on December 7, 1992. (Appendix, item 7).

Petitioner moved to transfer the unfair labor practice cases to the NLRB for consideration of its Motion for Summary Judgment on November 2, 1992. On January 4, 1993, the Deputy Executive Secretary of the Board entered an Order Denying Motion for reasons articulated only as unspecified "genuine issues of material fact". (Appendix, item 8).

Hearings were conducted before an Administrative Law Judge ("ALJ") between May 18-26, 1993, who thereafter issued his findings of fact, conclusions of law, and recommendations as to remedy on July 8, 1994. Petitioner's exceptions to the ALJ's report and recommendations, pursuant to 29 C.F.R. § 102.46, were overruled by a three-member panel of the NLRB by its Decision and Order of September 15, 1995. (Appendix, item 1, pp. 1-33).

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[3] Petitioner filed a Conditional Request for Review of the Acting Regional Director's July 3, 1991 Decision and Order to the extent it rejected Petitioner's claim to share the City's statutory exemption under Section 2(2). This Conditional Request for Review was not decided by the NLRB in view of its denial of the Steelworkers' Request for Review which, pursuant to 29 C.F.R. § 102.67(f), served as an "affirmance of the Regional Director's action . . . preclud[ing] relitigat[ion of] such issues in any related subsequent unfair labor practice proceeding."

In overruling Petitioner's exceptions, the NLRB relied substantially upon its Decision in *Management Training Corp.*, 317 NLRB 1355, issued six weeks earlier on July 28, 1995.

ARGUMENT

A. Introduction

This matter is brought before the Supreme Court because the Sixth Circuit of Appeals has decided an important question of federal labor law arising under the National Labor Relations Act, as amended, that has not been settled by this Court, and, further, has done so in a way that conflicts with relevant decisions of this Court.

Specifically, the Sixth Circuit Court of Appeals has approved the recently-articulated position of the NLRB that it will henceforth exercise jurisdiction over contractors of exempt political subdivisions, regardless of the degree of control over wages, hours, and other terms and conditions of employment of its contractor which are retained by the government. *Management Training Corp.*, 317 NLRB 1355 (1995). The NLRB's *Management Training* test for asserting jurisdiction over a contractor in these circumstances is unconcerned with fundamental policies arising under the Act, and overrules almost fifty years of agency and judicial precedent. Despite various analyses utilized to evaluate the propriety of asserting jurisdiction over private entities contracted with political subdivisions, articulated in both statutory and discretionary jurisdictional terms under Sections 2(2) and 14(c)(1) of the Act, respectively, *Management Training* changes the legal landscape by ignoring a private entity's ability to engage in meaningful bargaining. Now, the NLRB will assert its jurisdiction, "[S]imply by the minimal showing that the [contractor] both 'meets the definition of "employer" under Section 2(2) of the Act,' and 'meets the applicable monetary jurisdictional standards.'" Opinion of the Sixth Circuit, in the case below, at

p. 10, citing *Management Training*, 317 NLRB at 1358. (Appendix, item 2).

The importance of prompt resolution of the consonance of *Management Training* with the Act is underscored by the NLRB's application of its rationale to other cases. Thus, in *Saipan Hotel Corporation, d/b/a Hafadai Beach Hotel*, 320 NLRB 192, n. 2 (1995), the NLRB relied upon *Management Training* as an "additional basis for asserting jurisdiction" over an employer who challenged that action on grounds that it did not retain sufficient control over essential terms and conditions of employment to engage in meaningful bargaining with respect to its nonresident employees.

Similarly, in *D&T Limousine Service, Inc.*, 320 NLRB 859, 860 at n. 3, (1996), the NLRB has relied upon *Management Training* to assert jurisdiction over an employer notwithstanding and without analysis of a contention that the entity was a joint employer with an exempt entity subject to the Railway Labor Act.

In *Teledyne Economic Development*, 321 NLRB 58, at n. 1 (1996), enforced, 108 F.3d 56 (4th Cir. 1997), the NLRB relied on *Management Training* to grant General Counsel's Motion for Summary Judgment on refusal to bargain charges under Section 8(a)(5) designed to test a union's certification. There, the union advanced bargaining proposals on "wages and other terms of employment that [the respondent-employer contended] could not be changed without the approval of the Department of Labor." (*Id.*) This was of no consequence to the NLRB which found a "blanket refusal to bargain", and failed to limit the scope of its remedial order which directed the employer to "bargain on request with the Union." 321 NLRB at 59.

In *Board of Education of Calvert County, Maryland*, 322 NLRB No. 144, 154 LRRM 1089 (1997), the NLRB issued an advisory opinion that *Management Training* rendered it "irrelevant" to consider a union's contention that a

county school board and independent contractors who provided student bus services were joint employers under the Act. 154 LRRM at 1091. The union had sought such a determination so as to support its position that contract drivers should accrete to a unit of noncertified school board employees it represented under state law. *Id.*, at 1089.

For the reasons set forth hereafter, *Management Training, supra*, should be subjected to prompt review by this Court given its departure from established precedent, and the NLRB's ever-expanding application of its principles as illustrated above.

B. The NLRB's Management Training Decision Offends Section 2(2) Of The Act

Section 2(2) of the Act exempts from its coverage "[a]ny State or political subdivision thereof, . . ." 29 U.S.C. § 152(2). Over the past five decades, both the NLRB and the courts construed this Section to prohibit the NLRB's exercise of jurisdiction over government contractors whose essential terms and conditions of employment were closely controlled by the exempt contracting governmental entity.

Thus, in *Teledyne Economic Development Co.*, 223 NLRB 1040 (1976), and *Ohio Inns*, 205 NLRB 528 (1973), the NLRB refused to assert jurisdiction over private contractors of exempt political subdivisions because, the contractor "shared" the political subdivision's "exemption from the Act", *Teledyne, supra*, 223 NLRB at 1041, or was a "joint employer" with the State under Section 2(2), *Ohio Inns, supra*, 205 NLRB at 528-29. Indeed, in *Ohio Inns*, the NLRB observed that notwithstanding the parties' desire that jurisdiction be asserted:

> "[I]t is our duty to examine the underlying facts in order to determine whether or not jurisdiction lies, and whether it would effectuate the policies of the Act to assert jurisdiction.
>
> * * *

> "The reason for this inquiry has practical, as well as legal, roots. When parties are subject to our jurisdiction, certain rights and obligations attach, and we must have the authority to enforce those rights and obligations. For example, when parties negotiate to the point of agreement, we have the authority to require that they reduce their agreement to writing, execute it, and thenceforward implement it. But when, as here, the state of Ohio has the power to disapprove of any collective agreement, any attempt on our part to enforce our law, in the event of such disapproval, would create an irresolvable confrontation between Federal and state authority. The same kind of confrontation could arise if we were to require reinstatement of any employee in an 8(a)(1) or 8(a)(3) proceeding, only to find that the State of Ohio could frustrate such an order if it were to declare such employee 'unsatisfactory.' " 205 NLRB at 529, n. 3.

Consistently, a number of Circuit Courts of Appeals viewed the issue as one of statutory jurisdiction under Section 2(2). *NLRB* v. *Pope Maintenance Corp.*, 573 F.2d 898, 902 (5th Cir. 1978); *NLRB* v. *Austin Developmental Center*, 606 F.2d 785, 789 (7th Cir. 1979); *Compton* v. *National Maritime Union*, 533 F.2d 1270, 1275 (1st Cir. 1976); and *NLRB* v. *Highview*, 590 F.2d 339 (5th Cir. 1979).

> "Where a private employer who has contracted to provide services to an exempt political subdivision does not retain sufficient control over the employment relationship to engage in meaningful bargaining, *Section 2(2) deprives the Board of jurisdiction because the exempt subdivision is deemed the true employer." Board of Trustees of Memorial Hospital* v. *NLRB*, 624 F.2d 177, 185 (10th Cir. 1980). (Emphasis supplied).

Notwithstanding the Section 2(2) analysis found in the above cases, the NLRB later re-characterized the issue as one subject to its discretionary jurisdiction under Section

14(c)(1) of the Act, 29 U.S.C. § 164(c)(1).[4] The cases recharacterizing the issue did so notwithstanding the foregoing authority, and without explanation as to the departure from a Section 2(2) basis for the doctrine. See, *e.g.*, *National Transportation Service*, 240 NLRB 565, 566 (1979). Nevertheless, the NLRB expressly embraced the rationale of certain cases applying the Section 2(2) analysis in its decision in *Res-Care, Inc.*, 280 N.L.R.B. 670, 673-74 (1986) wherein it addressed a perceived "lack of clarity" in *National Transportation, supra*. *Id.* at p. 672.

Management Training Corp., supra, represents a complete departure from any and all prior cases wherein the terms and conditions of employment of a contractor's employees are regulated by an exempt political subdivision. This departure is at odds with both the letter and the spirit of the Act as summarized above. Petitioner requests that its petition be granted to reconcile the apparent conflicts existing between *Management Training*, established precedent, and the operation of the Act in *all* of its rights and obligations.

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[4] Section 14(c)(1)'s emphasis is, of course, on the insubstantiality of the effect on commerce of labor disputes on a particular "class or category of employers." The consequent so-called "commerce standards" for the NLRB's exercise of jurisdiction seem inapposite to the different question presented by *Management Training, supra*. Indeed, it could be argued that nothing in Section 14(c)(1) permits the NLRB's declination of jurisdiction over government contractors on grounds of government control of labor and employment matters, such that the exemption, to the extent it exists at all, exists only pursuant to Section 2(2). See *Res-Care, Inc.*, 280 NLRB 670, 672 at n. 8 (1986).

C. Petitioner Is So Completely Controlled By The City Of Pikeville, Kentucky, That Meaningful Bargaining Is Incapable Of Performance And Not Merely Hypothetically Impaired. *Management Training's* Attempt To Discount The Act's Full Application To Private Contractors Controlled By Exempt Political Subdivisions Is Irrational And Contrary To Congressional Purpose And Intent.

Under *Management Training*, the NLRB will exercise jurisdiction over government contractors so long as they meet the statutory definition of employer under Section 2(2), and are sufficiently engaged in commerce as to meet the applicable NLRB-established monetary standard. Recognizing, as it must, the tension between this position and a contractor's lack of discretion under contractual limitations imposed by an exempt political subdivision, the *Management Training* Board discounts the resulting difficulty in complying with the Act, in all of its provisions, by stating:

> "[W]e have decided that it is not proper for the Board to decide whether to assert jurisdiction based on the Board's assessment of the quality and/or quantity of factors available for negotiation. The Employer in question must, by hypothesis, control some matters relating to the employment relationship, or else it would not be an employer under the Act. In our view, it is for the parties to determine whether bargaining is possible with respect to other matters and, in the final analysis, employee voters will decide for themselves whether they wish to engage in collective bargaining under those circumstances." 317 NLRB at 1358 (Footnote omitted).

Further, the Board discounted the dissent of member Cohen, wherein he articulated what the majority characterized as a "hypothetical [] lack [of] the ability to alter a particular mandatory subject of bargaining", as follows:

> "If the Board were to examine in a representation case the question of its jurisdiction as well as the question of whether an employer commits unfair labor practices on issues arising out of that employer's arrangements entered into with other parties or other factors that make it impractical to grant demands generally, we would open up extensive and unnecessary avenues for new litigation." *Id.*, at 1358-1359.

This rationale by the Board is overly-simplistic, and ignores the many frustrations of the purposes and policies of the Act which will *necessarily* arise from application of *Management Training*. What the Board envisions is *post hoc* review of a government-controlled contractor's compliance with the Act, following the conduct of representation case proceedings. This stands in sharp contrast to the pre-*Management Training* approach of evaluating the government's control, in advance. In this manner, the Board's objective of conserving resources as part of its justification for *Management Training* is hardly served. 317 NLRB at 1359. Now, under the new standard, the Board's concern over "wasteful litigation . . . over this issue" is disingenuous in that it will be merely postponed until unfair labor practice proceedings are commenced, following the completion of representation cases.

The many obligations of an employer under the Act are impaired by the Board's new standard, and rife with the potentiality, indeed, probability of new and unique theories of unfair labor practice liability. Extended discussion is not necessary to demonstrate how, as in this case, an exempt entity's control of the labor and employment policies of its contractor will create unworkable situations under the *Management Training* standard. For examples:

a. Section 8(d) of the Act, 29 U.S.C. § 158(d), defining the obligation to "bargain in good faith", pertains to "wages, hours, and other terms and conditions of employment"; not simply matters which are not

fixed by the exempt contracting entity. Given the expansive reading given by the Board to "other terms and conditions of employment", *e.g.*: *Mercy Hospital of Buffalo*, 311 NLRB 869 (1993) (reduction of cafeteria hours); *Allied-Signal Inc.*, 307 NLRB 752 (1992) (smoking policy); *St. Luke's Hospital*, 314 NLRB 434 (1994) (dress code); and, *Rangeair Acquisition Corp.*, 309 NLRB 1043 (1992) (length of holiday lunch break), it is plain that any exempt entity control over its contractor is, upon the contractor's assertion of same as the basis for refusing to bargain, a violation of Section 8(a)(5);

b. Exempt entity approval of all terms and conditions of employment offered by the contractor to its employees is antithetical to the requirement of Sections 8(a)(5) and (d) that employer negotiators have authority to bind the employer to an agreement, *Cablevision Industries*, 283 NLRB 22 (1987);

c. A contractor's refusal to execute an agreement arrived at with an exclusive employee representative violates Sections 8(a)(5) and (d), *Torrington Extend-A-Care Employees Ass'n* v. *NLRB*, 17 F.3d 580 (1994), *enforcing in part*, 310 NLRB 222 (1993), which would seem unavoidable were the putative agreement subject to exempt entity approval; and,

d. Economic action in the form of strikes and/or slowdowns would in essence be within the province of the exempt entity to resolve, when union demands are not met per the government entity's refusal to permit same.

The above observations are compellingly illustrative of the inherent lack of consonance between the purposes and policies of the Act, and the Board's newly-articulated *Management Training* jurisdictional rule. As previously summarized, it is the City which has the right to control wages, hours and terms and conditions of employment of hospital facility workers in their entirety. This right of control

emanates from the Sublease wherein the Petitioner's operation of the facility is at all times subject to the directions of the City, and the City's ownership of all hospital-generated revenues, expendable only as the City may permit. Petitioner is a captive contractor of the City, without other operations, and non-profit in character.

Management Training is, under the circumstances, an example of the Board having abandoned its statutory responsibility of furthering the purposes and policies of the Act, under the guise of administrative convenience, and the decision is irrational in its attempted justification for abandoning over five decades of contrary law. The judiciary must review the Board's presumptions both for consistency with the Act, and for rationality. *NLRB* v. *Baptist Hospital, Inc.*, 442 U.S. 773, 99 S. Ct. 2598, 61 L.Ed.2d 251 (1979).

For reasons discussed above, Petitioner's petition should be granted for legitimate issues concerning both the statutory consistency and rationality of *Management Training, supra.*

D. The Petition Should Be Granted Because *Management Training* Is At Odds With This Court's Decision in *NLRB* v. *E.C. Atkins & Co.*, 331 U.S. 398, *rehearing denied* (1947).

In *Atkins, supra,* this Court considered the issue of whether or not a manufacturer of armor plate, having established an auxiliary military guard force of 64 individuals as part of its responsibility under a contract entered into with the War Department, satisfied the employer-employee definitions of Section 2(2) and 2(3) of the Act with respect to the military guards. 331 U.S. at 405. The case arose in response to the employer's motion to dismiss a petition to certify the military guards as members of the union representing the employer's pre-contract complement of six watchmen. The motion to dismiss was premised

upon the employer's contention that the government was the employer of the military guards because its contract required their hiring at the government's insistence, and because the government paid their wages through the contract proceeds. *Id.* at 400.

The case was decided by this Court upon analysis of NLRA Sections 2(2) and 2(3).

> "Congress has not attempted to spell out a detailed or rigid definition of an employee or an employer . . .. [T]he terms 'employee' and 'employer' in this statute carry with them more than the technical and traditional common law definitions. They also draw substance from the policy and purposes of the Act, the circumstances and background of particular employment relationships, and all the hard facts of individual life." 331 U.S. at 403.

This Court went on to observe that if the "militarization [were] such as to transfer to the Army all the matters which . . . would form the basis for collective bargaining" then the military guards "may lose their status as private employees within the purview of the statute." *Id.*, at 405-06.

The military guards at issue were deemed employees of the employer, and not the government, because of limited government intrusion into the relationship, and because the employer retained the "power to determine the wages and hours of [the guards], coupled with the obligation to bear the financial burden" of same. 331 U.S. at 411, 413-14. In arriving at this conclusion, this Court observed that the NLRB, in performing its statutory duty:

> ". . . [M]ust bring to its task an appreciation of economic realities, as well as a recognition of the aims which Congress sought to achieve by this statute . . . . It is free to take account of the more relevant economic and statutory considerations." 331 U.S. at 403.

It is clear from *Atkins* that the NLRB's *discretion* in applying the statutory definition of employer, emanates from the statute itself. It is not, as contended in *Management Training*, a matter of Section 14(c)(1)'s general "involvement in commerce" discretion. To argue to the contrary flies in the face of *Atkins*, and this Court's pronouncement of interpretive discretion, not the discretion found in Section 14(c)(1) permitting the NLRB to exempt a class or category of employers from jurisdiction on the basis of commerce considerations.

Moreover, *Management Training* obviates the requirement of *Atkins* that in interpreting Section 2(2), the NLRB must consider "the circumstances and background of particular employment relationships." 311 U.S. at 403. In *Management Training*, the NLRB has simply abdicated this responsibility in proffering a blanket rule. This Court should grant the within petition because the NLRB's *Management Training* rule rests on an erroneous legal foundation. *NLRB* v. *Brown*, 380 U.S. 278, 290, 85 S. Ct. 980, 13 L.Ed.2d 839 (1965).

E. The Board's View Of This Court's Definition Of "Political Subdivision" As Used In Section 2(2), As Affirmed By The Sixth Circuit, Is Too Restrictive

In *NLRB* v. *Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604-05 (1971), this Court held that an employer is exempt from the NLRB's jurisdiction as a political subdivision of it is either:

> " . . . (1) created directly by the state, so as to constitute [a] department or administrative arm [] of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate."

Both the Board (Appendix, item 1) and the Sixth Circuit (Appendix, item 2), would analyze the second prong of

the definition to require City power over the appointment and removal of Petitioner's Directors in order for Petitioner to be a political subdivision under Section 2(2) of the Act. Nothing in *Hawkins* defines the responsibility "to public officials" so narrowly.

Herein, it is undisputed that members of Petitioner's Board of Directors are responsible to the elected officials of the City of Pikeville. The City, pursuant to the terms of the Sublease, directed under its plenary authority upon risk of Petitioner being held in breach, that Petitioner amend its Articles of Incorporation and By-Laws to *inter alia*, redefine the composition of its Board and remove references to religious missions and qualifications of Board members and the hospital administrator.

To subordinate this indication of hospital-Board responsibility to elected officials, to a technical requirement of City approval of Board members and power to remove same, is a distinction without a difference. In fact, it can be persuasively advanced that the responsibility of Petitioner's Board to elected City officials is, in this circumstance, more clearly demonstrated than if the City were merely to retain appointment/removal authority. Instead, the Petitioner is subject to the plenary control of the City and, as such, *Hawkins County, supra*, should be applied to declare Petitioner exempt from NLRB jurisdiction under the political subdivision exemption of Section 2(2) of the Act.

F. The Exempt Entity's Right To Control Its Contractor's Wages, Hours, And Other Terms And Conditions Of Employment Is Determinative Of The Contractor's Exemption Under The Act

Assuming, for reasons above, that *Management Training* represents an invalid interpretation and/or application of the Act, it is necessary to discuss the Board's departure from established precedent in characterizing Petitioner's

subservience to the City as a "sham", and in its purported examination of Petitioner's compliance with City directives. The ALJ (Appendix, item 1) premised his "sham" conclusion almost exclusively on his observation that the City's motivation was to defeat the NLRB's exercise of jurisdiction. This is erroneous as a matter of law. See *Board of Trustees of Fremont County* v. *NLRB*, 624 F.2d 177 (10th Cir. 1977), *denying enforcement* of *Bishop Randall Hospital*, 233 NLRB 441 (1977) upon which the ALJ relied.

The NLRB's affirmation of the ALJ's conclusion is devoid of independent analysis and merely adopts, *pro forma*, the ALJ's legally erroneous conclusion. (Appendix, item 1, p. 1).

Suffice it to say that the exemption from jurisdiction afforded contractors of exempt political subdivisions is premised upon the latter's "right of control" over wages, hours, and other terms and conditions of employment of the contractor's work force. *National Transportation Service*, 240 NLRB 565, 566 (1979); *Res-Care, Inc.*, 280 NLRB 670, 671 (1986). Indeed, in applying the *Res-Care* control test, the Fourth Circuit rejected an approach which would, as seemingly done herein, look beyond the contractual rights and responsibilities of the government and its contractor. In *ARA Services* v. *NLRB*, 71 F.3d 129, 134 (1995), the Fourth Circuit expressly rejected the NLRB's "invitation to look past the substance of the parties' own agreement" which, in that case, "plainly vest[ed] ultimate discretion in setting wages and benefits with [the political subdivision]." The Fourth Circuit refused to enforce an Order of the NLRB which asserted jurisdiction based on the political subdivision's "historical relationship" with its subject contractor "endors[ing] any reasonable adjustment in wages and benefits."

A return to the "right of control" test as the appropriate analytical standard requires that the Sixth Circuit's

opinion in this case be reversed. The Supreme Court should grant the within petition so as to instruct lower courts as to the permissible scope of the NLRB's review of the relationship between political subdivisions and their contractors.[5]

G. § 102.67(f) Of The Board's Rules & Regulations Does Not Permit Relitigation Of the Jurisdictional Issue In These Related Unfair Labor Practice Proceedings Under Established Precedent

The NLRB has held, and reiterated in this case, that Section 102.67(f) of its Rules & Regulations bars only the parties, and not the NLRB itself, from relitigating issues in unfair labor proceedings already decided in a related representation case. The NLRB's reliance upon *St. Francis Hospital*, 271 NLRB 498 (1984) for this proposition ignores that its import is constrained to scope of unit and voter eligibility issues, not issues concerning *jurisdiction*.

Indeed, apart from these proceedings, there appears to be no case decided by the NLRB on this issue, and the NLRB's extension of the *St. Francis* rationale to issues of jurisdiction presents important issues of res judicata and collateral estoppel. If jurisdiction may be revisited at will, no case, whether representational or of an unfair labor practice nature, will ever be subject to an endorsement of finality. Such conduct by the NLRB smacks of arbitrariness, and is of apparent questionable nature by reason of the NLRB's handling of this and other similar cases.

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[5] Ironically, the ALJ, the Board and the Sixth Circuit have all in this case overlooked the Petitioner's less than welcomed amendment of its Articles and By-Laws at the direction of the City. To suggest that City dominion over the affairs of the Petitioner is illusory or "a sham" is merely a convenient, though unfounded, appellation.

Preliminarily, it should be observed that the Acting Regional Director, on his own volition, postponed the complaint case pending a decision on the jurisdictional question raised in the related representation case. The Acting Regional Director undoubtedly viewed the outcome in 9-RC-15808 as affecting the jurisdictional foundation for proceeding with the complaint case.

This view is not without support in the NLRB's own precedent. Thus, in *Screw Machine Products Company*, 94 NLRB 1609 (1951), the NLRB after clearly stating that it did not differentiate between representation and complaint cases in matters of jurisdiction, overruled a then Trial Examiner's findings of 8(a)(3) violations following dismissal of an election petition on jurisdictional grounds. The unfair labor practices were, as here, allegedly committed before dismissal of the election petition. *Id.* at 1610-11.

Notwithstanding a changed jurisdictional standard which, in the interim, covered the employer's operations, the NLRB overruled the Trial Examiner, succinctly, when it characterized dismissal of the election petition as, "notice to all parties that any complaint case based on . . . unfair labor practices occurring before that date would similarly be dismissed." *Id.*, at 1611.

Screw Machine Products has not been overruled, and the NLRB has created narrow exceptions, not applicable here, to its general rule. Indeed, the NLRB in this proceeding relied upon these exceptions in attempted justification of its action.

In disagreeing with the ALJ's expression of uncertainty, the NLRB cited *Princeton Health Corp.*, 294 NLRB 640 (1989), *enf. denied*, 939 F.2d 174 (4th Cir. 1991), and *Children's Baptist Home*, 215 NLRB 303 (1974), enf'd 576 F.2d 256 (9th Cir. 1978), for the proposition that its "prevailing practice is to consider the whole case before us once

jurisdiction is asserted", and "not [to] restrict jurisdiction . . . to certain complaint allegations." (Appendix, item 1, p. 2 at n. 3).

The NLRB has overreached its own precedent in attempting to justify its affirmation of the assertion of jurisdiction here, following the Acting Regional Director's dismissal of the earlier representation case. *Children's Baptist, supra,* involved an employer's failure to request review of a jurisdictional determination in a representation case, following which the NLRB "assure[d] employees that their . . . union activities [were] protected . . ." 215 NLRB at 304. The NLRB relied upon the employer's omission in failing to request review, and the "highly inequitable" result otherwise obtained following NLRB assurances that jurisdiction existed, in refusing to entertain the employer's belated challenge to jurisdiction. *Id.*

In *Princeton, supra,* the rationale for exercising jurisdiction was the employer's *consent* to jurisdiction in the form of execution of an election stipulation, and entry of an Order thereon some 8 months before the employer requested reconsideration based upon "modifications in [its] business." 294 NLRB at 640. The NLRB declined to do so "for purposes of enforcing and ensuring compliance with, the Order already entered." *Id.*, at 641.

The *Princeton* and *Children's Baptist* exceptions have little, if anything, to do with the different issue presented here. There is no prior Board Order to protect, nor did Petitioner ever fail to timely question jurisdiction in these proceedings. That these exceptions to the general rule requiring uniformity of jurisdictional determinations exist, they serve to confirm the continued vitality of *Scrivener, supra,* erroneously ignored by the Board in this case. See

also, e.g., *Pickle Bill's, Inc.*, 224 NLRB 413, n. 1 (1976).[6]

This case presents an important question of the NLRB's accountability for jurisdictional Orders, duly entered, which it thereafter seeks to avoid by misapplication of its own precedent.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the petition be granted.

Respectfully submitted,

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[6] Notably, in *Pickle Bill's*, the Board affirmed the conclusion of the ALJ that *Children's Baptist, supra*, did not overrule *Robert Scrivener d/b/a/ A.A. Electric Co.*, 177 NLRB 504 (1969), and that the ALJ was correct in dismissing 8(a)(1) and (3) unfair labor practice charges based upon a lack of discretionary jurisdiction, while proceeding to address, and remedy, alleged violations of Section 8(a)(4) under the principles of *Scrivener*. *Pickle Bill's* confirms, then, that in the absence of its *discretionary* jurisdiction, the NLRB will not remedy violations of Sections 8(a)(1) and (3). The NLRB's conduct here is particularly questionable under the foregoing precedent when it is observed, additionally, that the bulk of the alleged violations it found Petitioner to have committed relate to interference with self-organization rights deemed unavailable in Case 9-CA-15808.

APPENDIX

NOTICE: This opinion is subject to formal revision before publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Methodist Hospital of Kentucky, Inc. ***and*** **United Steelworkers of America, AFL–CIO–CLC.** Cases 9-CA–27863, 9-CA–27932, 9-CA-27938, 9-CA–28003, and 9-CA–28041

September 15, 1995

DECISION AND ORDER

By Chairman Gould and Members Cohen and Truesdale

On July 8, 1994, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging party filed a brief in opposition to the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

The judge found that the Board should assert jurisdiction over the Respondent and that it committed various

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[1] The Respondent has excepted to some of the judge's creditability findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 91950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent does not except to judge's findings and conclusions pertaining to the employee support teams, the threats and no-talking rule issued by Supervisor Bob Ratliff, the threat by Supervisor Phyllis Bowling, and the poor evaluation given employee Judy Webb.

unfair labor practices in violation of Section 8(a)(1) and (3) of the Act. We agree that the Board has jurisdiction and adopt the violations that were found by the judge, but with regard to the jurisdictional issue we provide further explanation.[2]

In determining that the Board should assert jurisdiction over the Respondent, the judge relied on several alternative grounds, including *Res-Care, Inc.*, 280 NLRB 670 (1986). Under the *Res Care* standard, the critical inquiry concerned whether the employer retained control over essential terms and conditions of employees' employment and examined the scope and degree of control exercised by the exempt entity over the employer's labor relations. Recently, in *Management Training Corp.*, 317 NLRB No. 190 (July 28, 1995), the Board majority overruled *Res-Care* and established a new test for the assertions of jurisdiction over employers who operate pursuant to contracts with exempt governmental entities. In *Management Training*, supra, the Board announced that jurisdiction over such employers will no longer be determined based on the standard set forth in *Res-Care* but rather, in determining whether to assert jurisdiction, we will now consider only whether the employer meets two criteria: (1) the definition of "employer" under Section 2(2) of the Act and (2) the applicable monetary jurisdictional standards.

Upon careful review, we find that the Respondent meets both criteria of *Management Training*. The respondent, a nonprofit Kentucky corporation, operates a health care institution in Pikeville, Kentucky, providing both in-patient and out-patient medical and professional care services. The

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[2] Relying on *St. Francis Hospital*, 271 NLRB 948 (1984), we adopt the judge's conclusion that neither our prior determination in the related representation case nor Sec. 102.67(f) of the Board's Rules and Regulations bars our current consideration of whether the Board has jurisdiction over the Respondent. However, we find it unnecessary to rely on the judge's discussion of the purposes underlying Sec. 102.67(f), which appears in the last two paragraphs of sec. 1.E. of his decision.

judge found that the Respondent received in excess of $250,000 in gross revenues during the 12-month period preceding the issuance of the instant complaint and also received at least $50,000 in goods and materials directly from outside the Commonwealth of Kentucky. We adopt these findings and conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act. Therefore, under *Management Training,* the Board may assert jurisdiction over the Respondent.

Moreover, even if we were to apply the *Res-Care* standard, the Board's jurisdiction over the respondent is warranted here. The judge found that the Pikeville City Commission's resolution of January 14, 1991,[3] which the Respondent claims changed its relationship to the City and removed the board's jurisdiction, was a sham transaction.[4] Based on the credited evidence, he further found that after January 14, 1991, the Respondent retained sufficient control over essential terms and conditions of employment to enable it to engage in meaningful collective bargaining. The record fully supports these findings.[5]

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[3] The pertinent text of this resolution appears in sec. 1.A. of the judge's decision.

[4] We find it unnecessary to pass on the judge's findings concerning whether the January 14, 1991 resolution is preempted by the Act and therefore void ab initio.

[5] Member Cohen would not rely on *Management Training,* supra, a case in which he dissented. Rather, he would apply the *Res-Care,* supra, standard. Member Cohen agrees with the judge that the City Commission's resolution was a sham and that the Respondent retained sufficient control over the terms and conditions of employment to enable it to engage in meaningful collective bargaining. Having concluded that the Respondent was subject to Board jurisdiction at all relevant times, and remains so, Member Cohen finds it unnecessary to decide the question of whether the Board would issue an in futuro remedial order against an employer who is no longer subject to Board jurisdiction because of events occurring subsequent to the commission of unfair labor practices.

Furthermore, in the alternative, we agree with the judge that the Board should exercise jurisdiction over the Respondent for the limited purpose of remedying the unfair labor practices, which occurred several months before the Pikeville City Commission attempted, albeit unsuccessfully, to remove the Board's jurisdiction by passing the January 14, 1991 a resolution. See *Princeton Health Corp.*, 294 NLRB 640 (1989), enf. denied 939 F.2d 174 (4th Cir. 1991); *Children's Baptist Home*, 215 NLRB 303 (1974).[6]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the respondent, Methodist Hospital of Kentucky, Inc., Pikeville, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated Washington, D.C. September 15, 1995.

William B. Gould IV, Chairman

Charles I. Cohen, Member

John C. Truesdale, Member

(SEAL) National Labor Relations Board

James E. Horner and David Ness, Esqs., for the General Counsel.

Raymond C. Haley, III, Esq., of Louisville, Kentucky, for the Respondent.

Pamela T. Robinette, Esq., of Pikeville, Kentucky, for the Respondent.

Irwin H. Cutler, Jr., Esq., of Louisville, Kentucky, for the Charging Party.

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[6] Contrary to the judge's implication otherwise, the Board does not restrict jurisdiction over an employer to certain complaint allegations but rather our prevailing practice is to consider the whole case before us once jurisdiction is asserted.

DECISION

STATEMENT OF THE CASE

Wallace H. Nations, Administrative Law Judge, Based on charges filed by the United Steelworkers of America, AFL-CIO-CLC (Union) between September 20 and November 19, 1990,[1] the Regional Director for Region 9 ultimately issued a second consolidated complaint and notice of hearing dated January 4, 1991, the Regional Director for Region 9 ultimately issued a second consolidated complaint and notice of hearing dated January 4, 1991, which alleges that Pikeville United Methodist Hospital of Kentucky, Inc., nee The Methodist Hospital of Kentucky, Inc. (Hospital or Respondent) committed a number of acts that violated Section 8(a)(1) and (3) of the National Labor Relations Act. Respondent filed timely answer to the complaint, admitting some allegations and denying others. The Respondent also challenges the Boards's jurisdiction to hear and decide these matters.

The hearing was held in Pikeville, Kentucky, on May 18-26, 1993. Briefs and reply briefs were received from the parties on or before October 1, 1993. Based on the entire record, including my observation of the demeanor of the witnesses and after consideration of the briefs, I make the following

FINDINGS OF FACT

I. Jurisdiction

In its answer to the complaint, Respondent raised objections to the Board's exercise of jurisdiction in this case. Specifically, the Respondent questioned the Board's jurisdiction on the grounds:

1. That as an entity administered by individuals responsible to the electorate or to elected public officials, the Hospital is exempt from Board jurisdiction under Section 2(2) of the Act.

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[1] All dates are in 1990 unless otherwise noted.

2. That as an entity regulated by the City of Pikeville, Kentucky, in matters of "wages, hours and other terms and conditions of employment," the Hospital is precluded from meaningful bargaining over these matters requiring the Board to decline jurisdiction under Section 14(c)(1) of the Act.

3. That the revenues from operation of the Hospital are "owned by the City of Pikeville, Kentucky" thereby rendering the Hospital as not "sufficiently engaged in commerce to warrant the [B]oard's exercise of jurisdiction . . . pursuant to Sections 2(6), and (7) and 14(c)(1) of the Act."

4. That the Regional Director's Decision and Order in Case 9-RC-15808, dated July 3, 1991, precluded pursuit of the within unfair labor practice charges in accordance with established Board precedent.

The reference to Case 9-RC-15808 arises in connection with the Union's petition for the conduct of a representation election among "All Non-Professional Employees" of the Hospital. The petition was filed October 29. Following hearings regarding the appropriate unit in Case 9-RC-15808, in which the City of Pikeville, Kentucky (city), intervened, the Acting Regional Director for Region 9 issued his Decision and Order dismissing the petition on July 3, 1991. Therein, the Acting Regional Director, applying the Board's *Res-Care* doctrine,[2] concluded:

> Based on the foregoing and the record as a whole, and noting particularly that the [Hospital's] ability to bargain is limited by its obligation to submit any prospective collective-bargaining agreement to the City, an exempt entity, for approval. I find the [Hospital] lacks sufficient control over employment conditions to engage in meaningful negotiations. Accordingly, I conclude that it would not effectuate the purposes of the Act to assert jurisdiction herein and I shall dismiss the petition.

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[2] *Res-Care, Inc.*, 280 NLRB 670 (1986).

By Order of February 28, 1992, a three-member panel of the Board, chairman Stephens dissenting in part, denied the Union's request for review of the Regional Director's Decision and Order. During the pendency of the Decision and Order, the hospital moved for extension of the hearing date in the instant cases pending "final resolution by the Board of the jurisdictional issue" in Case 9-RC-15808. The motion was granted and an Order issued postponing the hearing indefinitely. On August 13, 1992, following the Board's denial of the Union's request for review of the Decision and Order in Case 9-RC-15808, the Board issued its order rescheduling hearing in these cases without comment regarding the rationale for doing so given the outcome of the underlying representation case.

On November 2, 1992, the Hospital moved for summary judgment as to the instant unfair labor practice cases relying on the lack of jurisdiction of the Board over its affairs as decided in Case 9-RC-15808. The Hospital further argued that principles established by Board precedent that might otherwise warrant the exercise of jurisdiction in these cases, despite the final outcome in the representation case, were inapplicable.

Both General Counsel and the Union opposed the Hospital's motion. On the Hospital's motion, the hearing date in these cases was extended pending the Board's disposition of the Hospital's Motion for Summary Judgment. By Order issued by Deputy Secretary Joseph Moore, and dated January 4, 1993, the Board denied the Hospital's motion seeking entry of summary judgment. After summarizing the arguments of all parties, the Order denying motion concluded:

> Having duly considered the manner, the [Hospital's] motion is denied because it raises genuine issues of material fact which would best be resolved after a hearing before an administrative law judge.

Following this Order, on January 25, 1993, the Regional Director issued an Order rescheduling hearing in the instant cases, giving rise to the instant proceeding.

A. *The Operative Facts Involved in the Jurisdictional Issue*

The Respondent has operated hospital facilities in Pikeville, Kentucky, since 1923. Until the 1960's, it operated a hospital at a different site than at present. In 1966, it purchased the premises of Appalachian Regional Hospital, and then entered into a series of transactions with the City of Pikeville enabling it to renovate and expand its building.

To comply with existing state law, the city created a holding company, the Pikeville, Kentucky Public hospital Corporation (Corporation) to issue approximately 2 million dollars in tax-exempt bonds to finance the renovation. These would be paid off over 40 years. Additional funding was obtained through Federal, state, and regional grants, and from private donations. As part of these arrangements, the Hospital conveyed its ownership interest in the property to the city without retaining any reversionary interest. The city then deeded the property to the Corporation. The property is to be transferred back to the city when the bonds are redeemed and cancelled.

The parties also executed a series of leases. The corporation leased the hospital facility to the city at an annual cost equal to the bond amortization rate plus related expenses. The initial lease period was for 1 year. The city was also granted "an exclusive option . . . after the one year period, to renew the Lease from year to year, for periods of one year at a time, until July 1, 2009." The lease further provides: that the city is responsible for "any and all taxes, charges, and assessments, if any, against the Hospital Project"; that the city will pay or "cause to be paid" all charges for utilities and services "rendered or supplied to the City in connection with its use and occupancy of the hospital Project; that the city maintain, repair, and, if necessary, replace the Hospital Project premises; that the city assumes the corporation's obligations, including the purchase of insurance on the premises and the adoption and approval of an annual budget; that "Throughout the effective period of the lease, the Hospital

Project will be operated under control and supervision of the city (either directly or by its sublessee) as a city governmental project; that revenues derived from operation of the Hospital project beyond what are necessary for its operation, bond amortization, and reserve fund establishment must be expended only to "redeem or retire Bonds in advance of maturity," to finance additional "capital improvements to the Hospital Project," or "to enhance and improve the services and or facilities of the Hospital Project, as determined by the governing body of the City"; that the "City will not expend any amount or incur any obligations . . . in excess of the amounts provided for current expenses in the current annual budget, except on proper justification and resolution by the governing body of the City"; that "so long as any Bonds . . . remain outstanding," the city "will perform or cause to be performed" annual audits that "reflect in reasonable detail the financial condition and records of the operation of said Hospital project," to be transmitted to and "kept on file with the Trustee and in the office of the City Clerk"; that the city will cause rates and charges for services to be increased should it appear that "gross income from the operation of [the hospital] is insufficient to enable the City . . . to make any payment required under the sublease, the lease or the Mortgage Trust Indenture"; that "the City will (directly or through it Sublessee) comply with all appropriate [F]ederal and State laws and regulation, including those applicable to the Hill Burton Act" in connection with the operation of the Hospital; and that the city refrain from the establishment or use of any other hospital or hospital facilities so long as the lease is effective.

The city then executed a sublease with the Hospital, giving the Hospital exclusive control and supervision over the facility as long as it complied with all the sublease provisions.

The Hospital's annual cost is equal to the city's annual cost. All of these transactions were done solely to permit financing in the form of a bond issue for the construction of a new building and renovation of the existing building.

The sublease further provides that the "Methodists (the Hospital) shall manage and operate" the hospital facility, and "supervise the operations of all the departments . . . pursuant to the directions of the City and with the requirements of all appropriate governmental regulations."

Other relevant provisions of the sublease include: city approval of the annual budget of the Hospital, including any subsequent "variations therefrom"; city approval of "rates for the services and facilities" charged by the Hospital, and any "revisions in such rates"; the Hospital's deposit of "all funds and revenues derived by the [Hospital] from the operation of the Hospital Project . . . in a revenue fund account of the City maintained in such bank(s) as shall be directed by the City," and subject to disbursement "as contemplated by the . . . budget for the cost of maintaining and operating the Hospital Project, including all wages and compensation of operating personnel . . . insurance and workmen's compensation . . . premiums"; the city's right to direct the expenditure of excess revenues for early bond retirement, capital improvement of the hospital facility, or enhancement of "services and/or facilities of the Hospital"; the city's right to require audits and to inspect the books of the Hospital; and, the Hospital's covenants to remain a "non-profit and tax exempt organization, " as well as to "continue to operate the property herein leased for the public purpose intended, as permitted by law."

The legal significance of the various documents was given in the testimony of Charles Musson at the representation hearing. He testified that the method of financing involved herein is commonly referred to as a "holding company bond issue," which, if pursued and implemented correctly, avoids the strictures of section 157 of the constitution of Kentucky. Section 157 regulates the incurrence of indebtedness by any "county, city, town, taxing district or other municipality . . ." The holding company form of financing involves the creation of an alter ego corporation by a governmental entity which, in turn, issues bonds for what must be a "public project."

A public project under Kentucky law is defined as:

> [A]ny lands, building or structures, works or facilities (a) suitable for and intended for use as public property for public purposes or (b) suitable for and intended for use in the promotion of public health, public welfare, or the conservation of natural resources.
> . . .

"Hospitals and health care facilities" are statutorily recognized as one form of "public project" for which a "governmental agency" may create a "non-profit corporation to act as an instrumentality . . . in the financing of public projects." To qualify as a "public project," the project must be owned by the governmental entity or its alter ego, thus the successive transfers of title from the Hospital to the city, then from the city to its alter ego, the Corporation. Not only must the project be owned by the governmental entity or its alter ego, but, additionally, all attributes of ownership must be exercised including control over the operation thereof. Such control over the operation of this public project, with regard to the bond issue, could have been exercised in one of two ways. First, the city could have relinquished control over the day-to-day operating affairs of the hospital, retaining the right to terminate the sublease, essentially a management contract, for any reason on an annual basis. Alternatively, the city could retain directional and supervisory control over the hospital operation of the project.

The city, under the lease and sublease, did retain the right to terminate the lease with the Corporation, and did vest in the Hospital, under the sublease, the authority to manage the Hospital. On notice to the Corporation, at lease 90 days preceding an anniversary date, the city may choose not to renew its lease for any reason, in which case both the city and the Hospital must surrender possession of the property to the Corporation. Should the city surrender its lease, the sublease automatically terminates and the Hospital loses all rights under the sublease.

The city did not, until it, through its Mayor, who is also chairman of the Hospital's board of directors, learned of

the Union's organizing campaign exercise any direction or control over the Hospital's operation. Since that date, it has gone through the motions of approving whatever the Hospital has chosen to do.

Prior to 1990, the city approved the Hospital's annual budget only once, in the year the leases were executed. In June 1971, the Hospital's proposed budget for fiscal year 1972 was presented to the city commission and approved. That budget lists the Hospital's anticipated expenses only in general terms, with only a single line for all wages and a single line for all employee benefits. The minutes of that meeting reflect no discussion of the budget. The city never audited hospital costs or approved rates for patient services, despite sublease provisions requiring such actions.

On June 10, 1972, employees of the Hospital began a strike against the Hospital. A short time later, the strike was ratified by the Communication Workers of America, AFL-CIO (Communication Workers). The strike continued until October 1974, when the Communication Workers sent the Hospital a letter terminating the strike and making an unconditional offer to return to work. Methodist Hospital of Kentucky, 221 NLRB 692 (1975).

When the Hospital refused either to reinstate the striking employees or hire them as applicants for new employment, the Communication Workers filed unfair labor practice charges against the Hospital. While the strike was in progress, the National Labor Relations Act had been amended to give the National Labor Relations Board jurisdiction over nonprofit hospitals. Included in the nonprofit hospital amendments to the Act was a requirement that employees of health care institutions must give the institution and the Federal Mediation Concillation Service written notice of their intention to strike 10 days before commencing the strike. Because no such notice had ever been given, the Hospital moved for summary judgment in the unfair labor practice cases.

The Board held that the notice requirement was not applicable in that case because the strike had begun long

before the nonprofit hospital amendments were enacted. On remand, the administrative law judge ruled that some of the Hospital's actions violated Section 8(a)(3) and (1) of the Act, and the Board agreed. Methodist Hospital of Kentucky, 227 NLRB 1392, 1392 (1977), enfd. in part 619 F.2d 563 (6th Cir. 1980):

> The Administrative Law Judge found, and we agree for the reasons fully set forth by him, that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the striking employees when vacancies arose on or about October 10, 1974. We therefore adopt his recommended Order requiring immediate and full reinstatement of the strikers to their former positions or, if those jobs no longer exist, to substantially equivalent positions without prejudice, and backpay for loss of earnings. We shall direct, in addition, that the respondent discharge, if necessary to accomplish such reinstatements, all employees hired since October 10, 1974, the date of such application for reinstatement.

The Board also found that the Hospital had committed some additional violations of Section 8(1)(3) and (1) of the Act, beyond those found by the judge. Specifically, the Hospital refused to hire former strikers as new employees because they had "engaged in union and/or protected concerted activity."

In 1990 the Union began an organizing drive among the Hospital's employees. Because of certain actions taken by the Hospital during that drive, the Union filed a series of unfair labor practice charges alleging certain violations of Section 8(a)(1) and (3) of the Act. These charges were all filed during the period from September 20, 1990, through November 19, 1990.

The Acting Regional Director for Region 9 issued a complaint against the Hospital on November 6, 1990, based on allegations made in Case 9-CA-27863. In its answer, the Hospital admitted to being an employer engaged in commerce within the meaning of the Act. It did not raise any challenge to the Board's jurisdiction.

The Acting Regional Director issued an order consolidating several unfair labor practice cases, and a consolidated complaint on December 20, 1990. In its amended answer to the consolidated complaint, the Hospital denied that it was an employer within the meaning of the Act, and alleged that it lacked sufficient control over employment relations to engage in meaningful bargaining. The Acting Regional Director later filed a second consolidated complaint. The Hospital repeated the denial of Board jurisdiction made in its answer to the first consolidated complaint.

The hearing on unit determination issues in Case 9-RC-15808 began on December 8, 1990, and was concluded on January 15, 1991. On December 10, 1990 (the Monday following the first 3 days of the hearing), a special meeting of the Hospital's directors was held because of the representation case. The directors passed a resolution to request the city to intervene in this representation case.

> Mr. Haley (at that time, counsel for the city): The purpose of the document is to indicate that the Methodist Hospital of Kentucky has asked the City to intervene in this proceeding.

Also on December 10, 1990, the city adopted a resolution authorizing its intervention in that case. Then, on the morning of January 14, 1991, at a special called meeting, the city commission passed a resolution effective immediately, allegedly pursuant to its authority retained in the sublease. This resolution reads:

> Whereas, the City of Pikeville, Kentucky, a Third Class City, created Pikeville Kentucky Public Hospital Corporation, a non-profit corporation of the City of Pikeville, Kentucky to hold title to all real estate and improvements located on the By Pass Road in Pikeville pursuant to the issuance of the Revenue bonds in 1969, upon which real estate is located a hospital facility; and,
>
> Whereas, the City of Pikeville, Kentucky and its creation, Pikeville Kentucky Public Hospital Corporation, and own the hospital facility; and,

Whereas, the City of Pikeville, Kentucky and its creation, Pikeville Kentucky Public Hospital Corporation and Methodist Hospital of Kentucky, Inc., a non-profit corporation, entered into a Sublease Agreement dated January 1, 1969, recorded in Deed Book 503, Page 134, which specifically sets forth that the City of Pikeville, Kentucky shall lease said real estate and hospital facility to Methodist Hospital of Kentucky, Inc., on an annual basis; and,

Whereas, pursuant to said Sublease Agreement, Methodist Hospital of Kentucky, Inc., is authorized to manage and operate the hospital facility pursuant to the directions of the City of Pikeville, Kentucky; and,

Whereas, the City of Pikeville, Kentucky has vital interests in the financial condition of the hospital facility including, but not limited to, the ongoing availability of affordable quality hospital services to citizens of the City and the surrounding area and the retirement of Revenue Bonds on which the City of Pikeville, Kentucky, is indebted through the year 2009; and,

Whereas, the terms and conditions of employment, as well as the number of employees by category or classification of said hospital facility could critically affect said interests;

Be it hereby resolved, that the City of Pikeville, Kentucky, by and through its authority retained in the Sublease Agreement, directs that its sublessor, Methodist Hospital of Kentucky, Inc., shall not enter into any contract of employment, whether individually extended or collectively bargained, nor shall it modify wage rates, hours of work or any employee benefit, whether pursuant to a written plan or practice, without the express written consent of the City of Pikeville, Kentucky or its designated representative.

The purpose of this resolution, according to testimony given at the representation hearing, was to preclude assertion of the board's jurisdiction over the Hospital. There was no evidence that the city was directly involved in the daily administration, operation or management of the hospital facility or influenced the Hospital's labor relations prior to 1991.

On the same day, the city commissioners passed another resolution designating Mayor May to be the person to oversee the Hospital's operation on behalf of the city.

The Acting Regional Director rejected the Hospital's claim to be a governmental agency or entity administered by individuals responsible to public officials, and thus concluded that the Hospital was an employer within the meaning of the Act. Relying on *Res-Care*, Inc., 280 NLRB 670 (1986), however, he concluded that the Hospital no longer retained control over the essential terms and conditions of employment, and that the purposes and policies of the Act would not be served by asserting jurisdiction over the Hospital. The Board refused to grant review.

A number of witnesses testified about this issue. Frank Carlton was the city manager for Pikeville from April 1, 1978, to about November 1, 1988. The mayor at that time was Dr. Hambley, a local physician. As city manager, Carlton ran the city in the mayor's absence.

The city had no special duties with respect to the Hospital during that time, other than by virtue of the Hospital being the city's largest customer for services. The city's only relationship to the Hospital was as a provider of municipal services. The only money it received from the Hospital was for payment of those services. The Hospital was no different than any other business operation within the city limits.

It had no responsibility for the Hospital's daily operations, did not review the Hospital's personnel policies, did not review the Hospital's discipline of employees; and was not responsible for the Hospital's hiring of new employees. It did not review any budget, or budget proposals from the Hospital. The city's audit did not include an audit of the Hospital, and the city received no audit of the Hospital.

The subject of ownership of the hospital was never brought to Carlton's attention, and was never raised during a meeting of the city commission. The Hospital was discussed at the city commission only in connection with

providing municipal services. Carlton does not recall any business from the Public Hospital Corporation having been brought before the city commission. Nor does he recall any Public Hospital Corporation officers being approved by the city commission.

Karen Wright Harris has been the clerk of Pikeville since 1988. It is her job to maintain the city's records. During her first year as clerk, the Hospital did not submit a budget to the city. Harris also does not recall any requests from the Hospital for approval of personnel matters in that year, nor any communication between the Hospital and the city commission. Even in 1989, the only matter concerning the Hospital that came before the city commission was the appointment of persons to fill vacancies on the board of the Public Hospital Corporation.

During the years 1988-1990, there were no requests from the Hospital for the city to approve any expenditures or to approve its budget. Audit reports indicate that the bond obligations were being kept current during those same years. With the exception of one time in the early 1970's, 1991 was the first year that the Hospital requested city approval of its budget.

The city commission has dealt with a multitude of subjects over the years Harris has been clerk, including work on the Peach Orchard guard rail, transfer of a cable franchise, selling a riding mower, and setting the date for Halloween. The only discussions of the Hospital she could find in city records, however, pertained to providing municipal services to the Hospital. Even during 1991-1993. Harris could find no open vote by the city commission regarding any of the Hospital's personnel matters.

According to Harris, the city's records include a number of documents pertaining to the Hospital that go back earlier than 1991. She could not say, however, when those documents were obtained by the city. There was no evidence that any of those documents were provided to the city prior to January 1991.

Thomas Webb Huffman served as an elected city commissioner from 1988 to 1990. During his term the Hospital did not come before the city commission for any reason. The subject of the Hospital, however, did come up. The city commissioners during this period studied the various city committees and boards looking at how long a term each committee's or board's members served. The commissioners' study reached the hospital board, but the Commissioners were told by the then Mayor Hamble, that this Board was separate and had nothing to do with the city. The Mayor, who had served in that position of about 25 years, was a physician working at the Hospital. At no time while Huffman was a commissioner did the city exercise any authority over the Hospital. It did not deal with personnel or budget matters of the Hospital and did not approve the Hospital's budget or study or audit its finances. To the best of Huffman's knowledge, the Hospital was operated by the Methodist hospital administration board. There are two boards affecting the Hospital. One is its board of directors and the other a city board, the Pikeville Kentucky Public Hospital Corporation. The members of the latter board were initially appointed by the city, and thereafter internally filled vacancies as they occurred.

It is Huffman's understanding that the city owns the real estate and improvements that make up the physical Hospital. It is his belief that this property will revert to the Methodist Church when certain bonds are fully paid. He received this information from among others, Mayor Hambley. He believes that the Church gave the Hospital to the city to be able to secure financing through the city.

Dr. John L. Tummons was the Hospital's administrator at the time of the representation case hearing. He had been the administrator since about October 1989. As administrator, Tummons managed the Hospital's operations, and was answerable only to its board of directors. Policies pertaining to the performance of each department's work were, at least in part, a responsibility of each department director. Labor relations policies, however, were devel-

oped by the Hospital's administrator, and applied uniformly to all hospital employees.

> Q. Could you give us a little bit more detail about your input and your formulation into the policies and procedures of the hospital insofar as they relate to labor relations?
>
> A. As far as all the personnel policies are concerned, they're my responsibility. I'm responsible for developing those and implementing those.

Tummons, with the assistance of his subordinates, essentially rewrote the book on employee relations policies to make them uniform throughout the Hospital's operations.

Only Tummons had authority to change those uniform policies and procedures.

> Q. Now, Dr. Tummons . . . is there any, does anyone have any authority to change any of the policies or procedures set forth in this manual other than yourself?
>
> A. No, they do not.

That authority was also spelled out in policy number 1.2 of the policy and procedure manual.

Tummons was also responsible as Administrator for the Hospital's "salary and budget pay system, all as set forth in policy number 302.2 of the policy and procedure manual."

> Q. So, is it fair to say, Dr. Tummons, that you're responsible for the establishment of all wage rates in the Hospital?
>
> A. Yes, final authority for those, yes.
>
> Q. Is it fair to say that you're responsible for the creation of any new jobs at the Hospital?
>
> A. Final authority for those, yes.
>
> . . . .
>
> Q. Any changes in pay scales or overall compensation system, that is your final authority to make those changes?
>
> A. Yes.

Once Tummons was hired, he learned that several areas of the Hospital's operations were "grossly understaffed" due to a lack of recruiting. In most cases, there were not enough people to fill all of the available positions. Because of the "desperate shape" they were in, Tummons made some key changes. He implemented a program that would pay a "recruiting" bonus to any employee who successfully recruited a new employee, and a "sign in" bonus of $2000 for certain categories of new employees. To receive the "sign in" bonus, the new employee was required to work for the Hospital for 1 year, or pay pack a prorated share of the bonus.

Juanita Deskins has been the Hospital's personnel director since December 1990, and was the acting personnel director from July until December 1990. Prior to that she had been the personnel assistant since 1980. Deskins stated that the Hospital has submitted information to the city regarding personnel matters. In 1992, the Hospital first sought city approval before hiring if the job involved an exception to the Hospital's budget. The city also approved hires that were within the budget. This was not done in 1990.

During 1992, the Hospital hired 150-200 employees. Deskins could not say how many of these involved exceptions to the budget, but that more than one or two hires were involved. She did not know of any instances in which Walter May or the city commission had rejected a proposed personnel action. If an exception to the budget was involved, the Hospital might be asked to submit more information. This additional documentation would not be needed if the hire was within the budget.

According to Deskins, the Hospital's administrator has the final decision on terminations. He has final authority to settle, deny, or act on grievances. He is also responsible for the overall compensation program. He also has final authority to clarify the personnel policies. In 1990, he could and did exercise extensive authority to make changes in the Hospital's personnel policies. In 1990-1991, he had

the final authority to approve the decision to fill a particular position.

Prior to 1991, a request for personnel would be submitted to the administrator. When he signed it, no more was needed to be done. Sometime in 1991, a new form was adopted. Deskins prepared the form that included on it a place for the city's mayor to sign. She was told by Dr. Tummons, then the Hospital's administrator, that the city's mayor had to sign off on those forms. She submitted this form for all of the employees hired in 1992. Walter May, who is both mayor and chairman of the Hospital's board, attended personnel committee meetings. Deskins had no direct conversations with May, however, about personnel matters.

Walter E. May

May took office as mayor of the city in January 1990 and was the City's mayor at the time of hearing. Pikeville has a city manager form of government, with the day to day operation of the city being the responsibility of the hired manager, with policies and guidelines being set by the elected city commission and mayor. The commission consists of four commissioners and the mayor. May is also a member of the Hospital's board of directors and became its chairman in 1990.

None of the members of the Hospital's board are appointed by the city or any government official. Until September 1991, the Hospital's board members selected and elected new members, subject to approval by the Kentucky annual conference of the United Methodist Church. Since September 1991, 15 hospital board members are elected by the hospital board and 9 are elected by the annual conference of the Church.

All members of the public hospital corporation's board initially came from the Hospital's board. Even now, most members of the public hospital corporation's board are also members of the Hospital's board. The Hospital's board is much larger, however, so there have always been members

of it who are not also on the public hospital corporation's board.

May is not aware of any requirement that members of the public hospital corporation's board also be members of the Hospital's board; when he testified at the representation case, however, all but one member of the public hospital's corporation's board had also been members of the Hospital's board. The sole exception had been a person who served on both boards, and who then resigned from the Hospital's board.

Neither the city nor the public hospital corporation has performed any independent audit of the Hospital. The city commissioners, since 1991, have relied on the audit performed by the Hospital. Prior to that they did not see an audit of the Hospital. The Hospital does not turn over any profits to the city, nor does the city write any checks to finance the Hospital's operations. The person who writes payroll checks for city employees receives different benefits than the hospital employees.

Although the city approved the Hospital's budget in 1991, May stated he did not know whether this had been done prior to the union campaign. He had previously testified that this had not been done prior to the union campaign, and he did not question the accuracy of his pprior testimony. he also agreed that there was not much presented to the city commission by the Hospital prior to the union campaign. In 1990, for example, the city did not approve hiring, promotions, disciplinary actions, applications for leave, changes in duteis or classifications, or other matters pertaining to the Hospital's labor relations. Prior to the union campaign, doctor's contracts were also not presented to the city commission of approval.

May is personally adamantly opposed to the unionization of any of the Hospital's work force. An indication of the depth of this opposition can be gleaned from his testimony about how he became aware of the involved union campaign. May first leaned of the union oganizing efforts

in the summer of 1990. He described learning of it in the following manner.

> I think my first hint that there was any union activity at the Hospital-organizing activity-and, this would have been in August or September of 1990-I was having dinner one evening in Pikeville, with my son. And, there were a couple of men, who were sitting in the restaurant, who kept glaring at me, and, seemed to be trying to make me uncomfortable, for some reason. They were strangers. I didn't know them. I didn't mention it to my son. I didn't want him-to have him particularly concerned about it. But, as soon as we left there, I made an effort to find out who these people were. I found out that one of them was an organizer for the United Steelworkers. . . . Because it was in a hotel coffee shop, I asked the owner of the hotel, if he knew who they were. I, also, asked the police chief, if he knew who they were. They did not seem like people that particularly liked me, and, I was just picking up bad vibes from them. [The chief of police] . . . confirmed pretty much what I said. He gave me the name of the person, and that they were working for the United Steelworkers.

The police chief, who did not know the people's identity when initially asked by May, evidently had the men stopped and required to identify themselves.

May mentioned the presence of the union men to then Hospital Administrator Tummons. He told him, "I made it perfectly clear to Dr. Tummons, that we did not want to have a union representing our employees." May was then a member of the Hospital's public relations committee. This committee attempted to become involved in decisions regarding the union campaign, but its efforts were, without exception, dismissed by Tummons as unnecessary. The committee got little information from Tummons.

According to May, that was Tummons' attitude on just about anything regarding the Hospital's operations. Tummons did many things without ever going to the Hospital's board. For example, he revised the Hospital's

personnel policies, often without requesting the hospital board'd approval.

As noted earlier, on January 14, 1991, the city commission passed a resolution purportedly prohibiting the Hospital from entering into a collective-bargaining agreement. On the same day, the city commissioners passed another resolution designating Mayor May to be the person to oversee the Hospital's operation on behalf of the the city.

On February 25, 1991, the city commissioners passed a resolution requesting the Hospital to rescind certain of its bylaws that the city believed might be in violation of certain laws and further requested that the Hospital notify them when it took the requested action. The Hospital took this action in April 1991.

When asked whether the January 14, 1991 resolution restricting collective bargaining was passed because of the Union's campaign. May said the answer is "both yes and no." He said the resolution was passed because the city did not want the Hospital to recognize a union. He agreed that it was passed "because the Steel Workers Union filed a petition with the National Labor Relatioons Board." He agreed that one of the reasons for adopting the resolution was to defeat the jursidiction of NLRB. The Regional Director so found in his Decision and Order resulting from the representation case. It was passed at a special meeting called on the morning of January 14, 1991, in order to be used as evidence in the representation case that afternoon.

Later in January 1991, May sent a letter to all hospital employees in which he disavowed any intention by the city:

> [T]o run the hospital on a day-to-day basis. This is inaccurate and a gross distortion of the realities of the situation. The fact is that the City of Pikeville has since 1971 been under a contract with the Methodist Hospital of Kentucky to operate the hospital. That contract remains in full force and effect. Under that contract, you have been an employee of the Methodist

> Hospital of Kentucky. Nothing has been done to change your employment relationship with the Methodist Hospital of Kentucky.
>
> Under this contract, the City of Pikeville retained authority with regard to the overall operation of the Hospital. As a result of the union representation petition, the City of Pikeville and the Methodist Hospital of Kentucky simply brought this contractual authority of the city to the attention of the national Labor Relations Board. However, this authority of the city is nothing new. The city has had it ever since the financing for the hospital construction twenty years ago. A portion of that debt is still outstanding.

This letter appeared under the city's letterhead, and was signed by Many as the city's mayor.

May, in his dual roles as hospital board chairman and mayor continued to use the January 14, 1991 resolution purely to avoid Board jurisdiction. In 1990, a dispute arose between the Hospital and the Kentucky annual conference of the United Methodist Church, which continued on into 1991. During the course of the dispute. Reverend Sewell Woodward, a representative of the annual converence, asserted that the Church owned the Hospital and would sell it if the Hospital directors did not agree to changes in the Hospital bylaws that the annual conference required. During the course of the dispute, there was a series of meetings and an exchange of the correspondence between representatives of the annual conference and of the Hospital. On April 1, Glen S. Bagby, apparently a representative of the annual conference, wrote to Pamela Robinette, attorney for the Hospital, in which he noted:

> My understanding is that your hospital board is composed of approximately 3/4 Methodists, and my understanding (and all of these understandings are basically from you and Mayor May) would rather leave the "ownership of the property" issue on the shelf during the current labor dispute and until it is resolved, assuming for the moment, that this is a successful defense. This appears to also be what Mayor May desires to do.

Robinette promptly forwarded this letter to May, but May never told Bagby that that understanding about the ownership of the Hospital was incorrect. In April 1991, the representation case was still pending before the Board.

According to May, the Hospital now approves pay increases subject to the city's approval. Personnel matters are likewise voted on by the Hospital's board, and then referred to the city. Yet regardless of the volume of paper sent from the Hospital to the city since 1991, it still appears that the Hospital is running its operation on its own, and the city is merely rubber stamping its approval on anything the Hospital either does or wants to do.

Shortly after January 14, 1991, Deskins was told to submit a form to the hospital administrator for the hiring of any employee, with a place for the mayor to indicate his approval. She developed such a form. The form includes all employees, from the lowest paid to the highly compensated. Although the form includes the rate of pay for hourly employees, it does not contain the rates of pay for the more highly compensated salaried employees, an omission that belies any serious concern by the city about the cost of operation of the Hospital.

A review of the many documents, which comprise Respondent Exhibit 53, shows that beginning in the fall of 1992 there begin to appear more written requests for greater detail in documentation. The Order in this case setting the second amended consolidated complaint for trial is dated August 13, 1992. As the Hospital realized that it would actually be going to trial in these unfair labor practice cases, it appears that it began to document its file more completely than previously. Beginning about October 15, 1992, the Hospital began for the first time to send transmittal letters to Mayor May along with the "Approval Sheets." May was, from 1990 until his testimony in this case, chairman of the Hospital's board and a member of the Hospital's executive committee. As such, he already had the information that his subordinate, the Hospital's administrator, communicated to him in his capacity as

Mayor. On some documents on city stationary, regarding the Hospital's termination of some employees, May signed as chairman of the Hospital's board. He admitted that his multiple roles sometimes caused confusion.

B. *Is the Hospital a Political Subdivision of the City of Pikeville Within the meaning of Section 2(2) and Exempt from the Board's Jurisdiction?*

Section 2(2) of the Act, expressly exempts from coverage, "any state or political subdivision thereof. . . ." The political subdivision exemption:

> [T]raditionally has been limited to (1) entities that are created directly by the State, so as to constitute departments or administrative areas of government, or (2) entities that are administered by individuals who are responsible to public officials or to the general electorate. [Prairie Home Cemetery, 266 NLRB 678 (1983), citing Wordsworth Academy, 262 NLRB 438 (1982), and footnoting to NLRB v. Natural Gas Utility District of Hawkins County, Tennessee, 402 U,S, 600 (1971).]

Respondent concedes that the Hospital, a separately incorporated nonprofit organization was not "created directly by the State," and, is not exempt from jurisdiction on that basis. It does contend that under the circumstances of this case, however, the terms of the sublease awarded by the city to the Hospital, and the city's participation in its affairs, demonstrate that the Hospital is and has always been subject to the plenary control and direction of elected and/or appoint officials of the city, and thus is an entity edministered by individuals who are responsible to public officials within the meaning of the second test for exemption articulated in Wordsworth Academy, Supra.

It also contends that the hospital was directly created by the city. This is patently incorrect and an erroneous change in its position in the representaiton case. This matter was ruled upon correctly by the Regional Director

in his Decision and Order of July 3, 1991. Therein he found:

> The Employer and city concede that the Employer, a nonprofit corporation in existence since 1923, was not created by the City or any other governmental entity and thus is not exempt from jurisdiction on that basis. The Parties contend, however, that the Employer shares the City's exemption under the second prong of the test based on the participation and control exercised by public officials and/or their appointees in the Employer's operation. The argument offered in support of this assertion is not persuasive.
>
> Although some public officials (i.e., the Mayor) and representatives of the Public Hospital Corporation are members of the Employer's board of directors, they are not subject to confirmation by the City and do not serve as a consequence of any local ordinance. The record discloses that the City has no authority to decide the composition or structure of the Employer's board of directors which is, in essence, its policy-making body. Clearly, neither the board of directors inself nor the individual members in their capacity as board members have direct personal accountability to the City or the general public. See, Morristown Hamblen Hospital Association, 226 NLRB 76 91976); Cape Giradeau Care Center, 278 NLRB 1018 (1986).
>
> The parties also contend that the City's primary control over the Employer's management of the hospital as enumerated by the sublease's various provisions are sufficient to warrant a finding that the Employer shares the City's exempt status. As evidence of its plenary control, the city notes that should the Employer fail to comply with the terms of the sublease, the City may immediately terminate the Employer's right to manage the publicly-owned facility and may, in fact, cancel at its option for any reason prior to the sublease's next renewal. The City's Contractual rights, vis-a-vis the Employer, however pertain to the manner in which the Employer is required to provide services rather than defining its existence as an exempt entity.

> Accordingly, based on the foregoing and the record as a whole, I find that the Employer is not a government agency or an entity administered by individuals responsible to public officials and thus is an employer within the meaning of Section 2(2) of the Act.

I concur.

C. *Is the Hospital Exempt from the Board's Jurisdiction Due to Its Inability to Engagge in Meaningful Collective Bargaining?*

Respondent takes the position that it will not effectuate the policies of the Act for the Board to exercise jurisdiction in this case, given all the circumstances. In his Decision and Order of July 3, 1991, the Regional Director held:

> In *Res-Care, Inc.*, 280 NLRB 670 (1986), the Board concluded that the decision whether to assert jurisdiction over an employer providing services to an exempt entity must focus on the control retained by the employer with respect to "essential terms and conditions of employment." If the exempt entity possesses ultimate discretion over basic economic terms, then the employer cannot engage in meaningful collective bargaining as assertion of jurisdiction is not warranted.
>
> The Employer's sublease with the city specifically provides that the management, operation and supervision of the hospital shall be "pursuant to the directions of the City." Such language, standing alone without any evidence of the city's participation in, or approval of, the employer's labor relations matters, does not constitute the type of control necessary to demonstrate that the Employer lacks the capacity to engage in meaningful bargaining. Nevertheless, given the city's recent resolution requiring the Employer to obtain its express written consent in order to "enter into any contract of employment whether individually extended or collectively bargained, nor . . . modify wage rates, hours of work or any employee benefit," it is clear that the city now acts in a controlling rather than advisory capacity with respect to wages, benefits, and personnel policies. See, *Board of Trustees of Memorial Hospital* v. *NLRB*, 624 F.2d 177 (10th Cir.

1980), cited by the Board in support of its rationale in *Res-Care, Inc.*, supra at 673.

The Board will not assert its jurisdiction over an employer in circumstances when an exempt governmental entity has the right of disapproval over a collective-bargaining agreement entered into by the employers. See *Board of Trustees of Memorial Hospital*, supra; *Ohio Inns*, 204 NLRB 528 (1973).

The Petitioner asserts that the contractual relationship between the Employer and the city did not previously involve any approval by the city of the Employer's labor relations and the resolution asserting such control is a sham transaction devised to evade the Board's jurisdiction. The Petitioner has not, however, offered any evidence demonstrating that the city will not exercise the right of approval that it has recently claimed or that its approval of the Employer's personnel policies in the future will be routinely granted.

Based on this rationale, the Regional Director concluded that the Board should decline to exercise jurisdiction. I disagree. I believe that the city's January 14, 1991 resolution was preempted by the Act, and that the evidence reflects that the city's control is a shal designed solely to defeat the Board's jurisdiction, based on its continued routine approval of the Hospital's operation.

The city commission's resolution of January 14, 1991, is preempted by the Act

It should be noted at the outset that this is not the first time the Respondent has been involved in a Board proceeding. On June 10, 1974, Respondent's employees went out on strike. On August 24, 1974, the new amendments to the Act creating the new Section 8(g) became effective. A complaint issued over that strike and it was Respondent's contention that there was no merit to the complaint because the striking employees had not complied with the requirements of the new Section 8(g). The involved administrative law judge ruled in 221 NLRB 692 (1975), that the Board did have jurisdiction over Respondent, finding

that it was an employer within the meaning of Section 2(2) and (14) of that Act. The case was remanded by the Board to the administrative law judge, who again found Respondent to be an employer within the meaning of the Act. (227 NLRB 1932 91977).) On appeal by the Respondent, the U.S. Court of Appeals for the Sixth Circuit affirmed the Board's decisions in pertinent part at 619 F.2d 563 (1980).

There was no change in the Respondent's status vis-a-vis the City of Pikeville from the time the Board previously found Respondent to be a statutory employer until january 1991, a date after all of the alleged violations of the Act had occurred. The changes that took place after January 1991 had as their admitted purpose the removal of Respondent from Board jurisdiction to avoid having its employees having the right to choose a union to represent them. Mayor May stated that when he first learned of the current organizing campaign, he went to Dr. Tummons and "made it perfectly clear to Dr. Tummons, that we did not want to have a union representing our employees." Prior to that date, the city government had totally ignored the operations of Respondent. Only after gaining knowledge of the organizing campaign did the Hospital seek protection behind the facade of city control of its operations. I agree with the Campaign Party and the General Counsel that even the post-January 1991 actions designed to show city control are only an illusion and not a reality. May had himself designed by the city commission to act in its stead to oversee the Hospital's operation. He was already doing that in his capacity as chairman of the Hospital's board of directors. All of the matters involving the Hospital's budget and its personnel actions that he had sent to him as Mayor were available to him prior to their being sent, and at least with respect to the budget, had his prior approval as chairman of the board. May, as Mayor, and/or the city commission did nothing thereafter but grant routine approval of the Hospital's actions or requests for action.

As noted earlier, prior to January 1991, the city government had totally ignored the operations of Respondent.

When Mayor May was asked if Respondent had ever sought approval from the city commission for changes in room charges before the organizing campaign, May replied: "I don't think they (the Hospital) were presenting much to the city commission at all, prior to that-no."

The General Counsel contends that the city commission's resolution of January 14, 1991, expressly passed for the purpose of ousting the Board from jurisdiction, is preempted by the National Labor Relations Board Act, and that that resolution prohibiting Respondent from entering into a collective-bargaining contract is void ab initio. The General Counsel points out that the Supreme Court has developed two lines of preemption doctrine in Federal labor law. The first applies to state laws that would affect conduct arguable protected by Section 7 or prohibited by Section 8 of the Act and, therefore, subject matter that is within the primary jurisdiction of the Board. See San Diego Bldg. Trades council v. Garmon, 359 U.S. 236 (1959), where the Court held, at 244-245, "when an activity is arguably subject to Section 7 or Section 8 of the Act, the States, as well as the federl courts must defer to the exclusive competence of the National Labor Relations Board if danger of state interference with national policy is to be averted." The Court in Garmon set out two exceptions to the preemption of state regulation of conduct: (1) activity of merely peripheral concern to the NLRA; or (2) conduct that touches: interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that congress had deprived the states of the power to act." 359 U.S. at 244. (Footnote omitted.) The second doctrine proscribes state intervention in labor relations that Congress intended to leave unregulated, i.e., recourse by both the employer and union to self-help. See Machinists v. Wisconsin Employment Relations Commission, 476 U.S. 132 (1976).

In the instant cases, the city commission has deliberately interposed itself between Respondent and the union

in an effort to deprive employees of their rights guaranteed by Section 7 of the Act. Mayor May admitted that such was the purpose of the resolution passed by the city commissioners. Therefore, the Garmon principle of preemption operates to preclude the city government from now legislating in this area. The city commission had refrained from involving itself in the internal affairs of the Hospital prior to the passage of this resolution, and subsequent to its passage there is no evidence that the operation of the Hospital has changed in any way. Thus, these cases are controlled by Division 1287 v. Missouri, 376 U.S. 74, (1963), in which the Supreme court struck down a Missouri law permitting state seizure of struck public utilities, noting, "Missouri, through the fiction of 'seizure' by the state, had made a peaceful strike against a public utility unlawful, in direct conflict with federal legislation which guarantees the right to strike." Of particular relevance to the instant cases is the Court's statement that:

> Whatever the status of the title . . . acquired by the State as a result of the Governor's executive order, the record shows that the State's involvement fell far short of creating a state owned and operated utility whose labor relations are be definition excluded from the coverage of the NLRA. The employees of the company did not pay their wages, and did not direct or supervise their duties . . . Missouri did not participate in any way in the actual management of the company, and there was no change of any kind in the conduct of the company's business. As summed up by the Chairman of the State Mediation Board: "So far as I know the company is operating now just as it was two weeks ago before the strike, [*Id.*]

The city commission's resolution is also preempted even if it is more narrowly viewed as the city commission's effort to give the Respondent added economic leverage if faced with increased employee demands as a result of the Union's organizing campaign. The city commission's conduct, viewed thusly, is similar to an attempt by the Los Angeles city council to condition a taxicab franchise re-

newal on settlement by the taxicab company of a labor dispute it had with a union. In finding the city council's action preempted, the Supreme Court stated:

> Free collective bargaining is the cornerstone of the structure of labor relations carefully designed by congress when it enacted the NLRA [citations omitted]. Even though agreement is sometimes impossible, government may not step in and become a party to the negotiations. [Citations omitted]. A local government, as well as the Labor Board, lacks the authority to "introduce some standard of properly balanced bargaining power" [citations omitted . . . The settlement condition imposed by the Los Angeles City Council . . . destroyed the balance of power designed by Congress . . . *Golden State Transit Corporation* v. *Los Angeles,* supra, at 619 (1986).

By limiting Respondent's power to engage in collective bargaining, the city of Pikeville has attempted to prevent or warp a bargaining relationship, which is otherwise protected by Sections 7 and 9 of the Act.

Though the city commission resolution spoke of the city commission's concerns about the effect on the city of the terms and conditions of Respondent's employees, this assertion does not permit the city commission or the Respondent to claim that the employees' terms and conditions of employment are so deeply rooted in local sentiment as to bar preemption. Because employee's terms and conditions always affect the economic health of local communities and governments, such an interpretation would permit the exemption to preemption doctrine to swallow the doctrine whole.

Moreover, the city commission's assertion of its purported interest is itself a sham, given the fact that although the city commission has had a longstanding interest (since 1971) in the economic health of the Respondent, the city commission has not protested Respondent's failure to submit its budget to the city on an annual basis despite such a requirement in the city/Respondent sublease. Finally, even when asserting a sudden interest in Respond-

ent's economic status, the mayor/chairman of Respondent's board admitted, during the representation hearing, that he did not know whether Respondent was meeting its other financial obligations. He also admitted that Respondent could enter into contracts for goods or service, both of which could have significant financial impact, without the approval of the city. Thus, the resolution was not intended to give the city commission effective control over Respondents' operations but rather, it was intended to deprive employees of their Section 7 rights. Moreover, preemption doctrine aside, it is very questionable whether the sublease gives the right to the city commission to pass such a resolution. Barring entering into a collective -bargaining agreement is certainly not a right specifically retained by the city in the sublease. And it is not a legitimate concern under the sublease. The city has a legitimate interest in having the bonds paid off, and very little else under the sublease.

The Board is not prohibited from voiding an improperly motivated action that if properly motivated and implemented would have deprived the Board of its discretionary jurisdiction. In Bishop Randall Hospital, 233 NLRB 441 (1977), the Board found it had jurisdiction over a private employer, the Lutheran Homes and Hospitals Society (the Society), which leased and operated a hospital from a public board of trustees, that board being appointed by county commissioners pursuant to a Wyoming statute. Jurisdiction was asserted after a union was certified as the collective bargaining representative of the hospital's nurses. It was noted that while the amendments purported to relieve the Society of much of its control over labor, relations, in reality there was no evidence that the operation of the hospital actually changed. The Board affirmed the ALJ's findings that:

> [E]ven were it presumed the existence of the new or additional powers granted by the Society to the Trustees under the . . . lease amendments are sufficient indicia of increased control over the former by the latter to warrant the Board's declination of juris-

> diction as a general premise, I would nevertheless find under the circumstances of this case such jurisdiction should be exercised. The Board and the Federal Courts have consistently held a respondent may not circumvent the issuance of an order designed to remedy its conduct violative of the Act by interposing a contract it has executed, without regard to the apparent (on its face) legality of the contract in question. [*Id.* at 446.]

Although the City of Pikeville may have at some point lawfully carried out what it pretends to carry out at the urging of Mayor May in the instant cases, it may not now on behalf of Respondent interpose its tainted resolution to deprive the Board of jurisdiction because unit employees have exercised their Section 7 rights to respond to the Union's organizing campaign. See Parma Industries, 292 NLRB 90 (1988); Strawsine Mfg., Co., 280 NLRB 553 (1986). For the reasons set forth above, I find that the January 14, 1991, city resolution was void ab initio, and the facts of these cases support assertion of Board jurisdiction under *Res-Care* Inc., supra, and its companion case Long Stretch Youth Home, 280 NLRB 678 (1986).

In *Res-Care*, the employer operated a residential job corps center under a "cost-plus fixed fee contract" with the Department of Labor. Before awarding the contract, DOL had to approve the employer's budget line by line. Once the contract was in force, any changes in the employees' wages or benefits had to be approved by DOL, and if DOL disapproved of these additional expenditures for wages or benefits, it could reduce the contract payment to the employer. Under these circumstances, the Board found it would not effectuate the purposes of the Act to assert jurisdiction over this employer. In Long Stretch, supra, which involved a residential facility for teenage boys, the Board distinguished *Res-Care* and asserted jurisdiction over the employer since, although the Long Stretch facility was required to submit salary and benefit proposals to the state agency and to provide certain benefits, the agency did not control the exact levels of wages and benefits. Moreover, the employer's funding in Long Stretch, was not "cost plus,"

as in *Res-Care*, but rather per resident, and thus was not directly tied to the wage and benefit levels submitted to the agency.

As the Regional Director stated in his representation decision, prior to the passage of the offending resolution on January 14, 1991, "there is no evidence that the city was directly involved in the dialy administration, operation or management of the hospital facility or influenced the Employer's labor relations." Further, while the sublease requires annual audits of the Respondent's budget, with the exception of the first year of the lease (1971), there has been no city audit of hospital costs or city approval of rates for patient services. It should also be remembered that the city is not providing the money to fund the Hospital as was the agency in Res Care. It should also be noted that Mayor May specifically informed the Hospital's employees in his January 1991, letter, that the city's actions did not constitute a change in their relationship with the Hospital or the Hospital's relationship with the city.

Although the sublease provides that the management, operation and supervision of Respondent shall be "pursyant to the directions of the city," there is absolutely no evidence that prior to 1991, the city commission ever exercised any direction over Respondent's labor relations. There is no convincing evidence that subsequent to 1991 that the city has actually exercised any control over any aspect of the Hospital's operation, save for having it file numerous documents which May routinely approves, having previously approved, or known of the action they represent in his role as board chairman. In Florence Hicks, 302 NLRB 762 (1991), the Board asserted jurisdiction over an employer, notwithstanding that a government contracting officer retained the authority to disallow costs that increased from the initial proposal, where the evidence indicated that the authority was not routinely exercised. In so finding, the Board stated, supra at 765, "[A]n employer seeking to avoid the Board's exercise of jurisdiction carries the burden of showing that it is not free to set the wages, fringe

benefits, and other terms and conditions of employment for its employees." Consistent with this precedent, the mere language in the sublease that the operations of Respondent will be "pursuant to the directins of the city," is insufficient to carry the burden of establishing the requisite degree of control of its labor relations by the exempt entity. Having found the city commission's January 14, 1991, resolution void, I find that the Board should exercise its discretinary jurisdiction under *Res-Care*.

D. *Should the Board Exercise Jurisdiction for the Limited Purpose of Remedying the Unfair Labor Practices Found to Have Been Committed by Respondent?*

Although I recommend that the Board exercise its discretionary jurisdiction over Respondent, assuming it decides not to do so, I would recommend that it at least exercise jurisdiction for the limited purpose of remedying the unfair labor practices that I have found Respondent engaged in. In this case, the Board'd decision in the representation case was based primarily on the city's resolution in 1991, after the unfair labor practices at issue here had already been committed. Even assuming that resolution was not preempted by the Act, the circumstances that justified the Board's decision in the representation case did not exist until after the unfair labor practices had already been committed. Prior to that time, the Hospital and its employees were clearly under the Board's jurisdiction. This is evident both from the prior unfair labor practice case involving the Hospital, and from its answer to the first unfair labor complaint issued herein. In its numerous memorandums or letters to employees issued at the time of the commission of its unfair labor practices, Respondent did not even hint the Board might not have jurisdiction, and I believe it should be estopped from asserting this claim, at least with respect to the unfair labor practices involved in this proceeding.

The Hospital implies that the Board must look to a subsequent determinatin not to exercise jurisdiction to decide whether or not to exercise jurisdiction over prior un-

fair labor practices. It relies on *Screw Machine Products Co.*, 94 NLRB 1609 (1951), for this proposition. The facts in that case, however, are distinguishable.

In *Screw Machine Products Co.*, supra, the Board had twice decided that the employer did not meet its monetary jurisdictional standards. One determination occurred before the unfair labor practice charges had been committed, and the second occurred shortly after those unfair labor practices, as part of the same organizing drive.

There was no evidence that the employer had ever satisfied the Board's jurisdictional standards, much less that the Board's decision in the second representation case was affected by events that had occurred since the unfair labor practices were committed. Furthermore, the decision not to exercise jurisdiction was based on the amount of business being done, rather than on actions taken in order to remove the Hospital from the Board's jurisdiction.

In this case, however, the decision in the representation case was based on actions intended to remove the Hospital from the Board's jurisdiction, and to alter the outcome of the representation case. Those actions were all taken after the unfair labor practices had already been committed. prior to these actions, the Board had previously asserted jurisdiction over the Hospital. *Methodist hospital of Kentucky,* 227 NLRB 1932 (1979).

Thus, the decision in the representation case not to exercise jurisdiction was based on a charge in circumstances since the unfair labor practices were committed. In these respects, *Screw machine products Co.*, supra, is distinguishabel from this case.

The Hospital wants to rely on the city's January 14, 1991 resolution to absolve it of unfair labor practices that had occurred back in 1990, months before the city's resolution. The Board's decision in *Screw Machine Products Co.*, supra, does not support the hospital on this point.

I believe that under the rationale of *Children's Baptist Home,* 215 NLRB 303 91974), the Board should exercise

jurisdiction to remedy the unfair labor practices found to have been committed. It is clear that the employees of the Hospital had every right to believe that the Board had jurisdiction over the Respondent at the time of commission of the unfair labor practices. It had previously exercised jurisdiction in Methodist Hospital of Kentucky, supra, the Respondent's answer to the first complaint here admitted jurisdiction, and Respondent's communications to its employees during the organizing campaign, while mentioning Board law often, did not claim that the Board lacked jurisdiction. Charging Party would read *Children's Baptist Home,* supra, as allowing the remedying of 8(a)(1) violations as well as violations of Section 8 (a)(3) and (1). As that matter is not entirely clear from a reading of Children's Baptist Home, I will leave this legal determination to the Board. It does seem to me imperative that the Board remedy the 8(a)(3) violations under the circumstances. It is rather pointless, however, to remedy the 8(a)(1) violations if the Board is not going to assert its full discretionary jurisdiction.

E. *Consideration of the Jurisdictional Issue is Not Barred by the Prior representation Case*

Throughout the litigation of these unfair labor practices, Respondent has contended that since the Acting Regional Director ruled in 1991 that the Board does not have jurisdiction over this Respondent, the General Counsel cannot claim that the Board does have jurisdiction. Counsel for General Counsel asserts that notwithstanding the Board's decision in the representation case denying review of the Acting Regional Director's decision, the General Counsel is not barred by Section 102.67(f) of the Board'd Rules and Regulations from relitigating the issue of whether the Board should assert its discretionary jurisdiction over Respondent. The General Counsel also asserts that the Board is not estopped from reconsidering its decision in the prior representation case. In my opinion, the Board has already ruled on this defense, in favor of the General Counsel. Its Order of January 4, 1993, denying Respondent's motion

for summary judgment necessarily ruled that the matter could be relitigated. Though this Order indicated that there were some factual issues to be decided, those could only affect a determination of whether the Board should exercise its discretionary jurisdiction. Additional fact findings would have no bearing on the matter of relitigation. Even in the event this is not so, however, I find the matter may be relitigated herein, Section 102.67(f) of the Board's Rules and Regulations notwithstanding.

Section 102.67(f) of the Board's Rules in relevant part states, that a denial of a request for review shall preclude the parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. In interpreting this section in P*ittsburgh Plate Glass Co.* v. *NLRB* 313 U.S. 146 (1941), the Supreme Court rejected an employer's claim that the Board had erred in refusing to receive, in the unfair labor practice proceedings, evidence on the subject of the appropriateness of the unit similar to that contained in the record of the representation proceeding. In so doing the Court stated, "the unit proceeding and this complaint on unfair labor practices are really one." Id. at 158. In a subsequent Board case, which allowed the relitigation of the supervisory status of an individual charged with separate 8(a)(1) violations, the Board commented that, "The Court's 'really one' case comment was made with reference to the unit finding in the representation proceeding and the subsequent refusal to bargain complaint case based on this unit finding." *Suburban Homes Corp.,* 173 NLRB 497 fn. 1 (1968). See also *Stanley Air Tools,* 171 NLRB 388 (1968); and *JAMCO (Johnson Architectural Metal Co.)* 294 NLRB 896 (1989).

It appears therefore, the term "related subsequent unfair labor practice," as used in Sction 102.67(f), normally applies to "an 8(a)(5) case based on the representation case certification." See *Greenbrier Hotel,* 216 NLRB 721, 723 fn. 5 (1975). The Board, however, recently affirmed without comment the conclusion of an ALJ that Section 102.67(f)

bars relitigation of a jurisdiction question in a proceeding addressing alleged violations of Section 8(a)(3) and (1) of the Act, where there was no test of certification. In *Verland Foundation,* 296 NLRB 442 (1989), the employer tried to relitigate the Board's prior Assertion of jurisdiction when the employer operated a health care facility subject to state regulation. The General Counsel argued that Section 102.67(f) prevented the employer from attempting to relitigate the jurisdiction issue. The employer argued that presence of the word "related" in the text of Section 102.67(f) meant that the section was therefore applicable only to test of certification cases. The ALJ rejected the employer's theory, noting that the text of Section 102.67(f) did not contain such a restriction and the the unfair labor practice case was related to the prior representation case because both were "premised on the issue" of the Board's jurisdiction over the employer. Id. at 443.

Even in the face of this case, I believe that Section 102.67(f) is not a total bar to relitigation of jurisdiction questions. In *St. Francis Hospital* 271 NLRB 948 (1984), involving a 8(a)(5) allegation, the Board revisited and reversed a prior decision in a representation case, noting that:

> this prohibition against relitigation of representation issues in a subsequent technical 8(a)(5) refusal-to-bargain situation applies to the parties—the employer and the union—and does not preclude the Board from reconsidering its own earlier action [Id. at 949.]

In reliance on *St. Francis Hospital,* because the General Counsel was not a "party" in the representation proceeding within the meaning of Section 102.67(f), the General Counsel is not barred from placing the jurisdictional question before the board in these cases. Nor is the Board precluded from reconsidering its own earlier jurisdiction decision.

Furthermore, the relitigation of the jurisdictional question in these cases is not inconsistent with the purposes served by Section 102.67(f), which include the expeditious

holding of representation elections to permit employees to exercise their Section 7 rights and similar expeditious implementation of election decisions. In those situations to allow an employer to relitigate jurisdictional questions in unfair labor practice cases in which unions have been certified and employers refused to bargain serves to deprive employees of the right to collective bargaining that they have achieved through union certification..

The posture of the instant cases, however, is the opposite of the posture of the cases to which Section 102.67(f) is usually applied, for the Regional Director's decision deprived the employees access to the Board and the opportunity to vote in a representation election. Thus, the literal application of Section 102.67(f) to foreclose consideration of the representation argument described below would result in precisely the effect the rule is normally used to prevent—the frustration of employee rights.

F. *Conclusion with Respect to Jurisdiction*

I find the Respondent, Methodist Hospital of Kentucky, Inc., a nonprofit Kentucky corporation, is engaged in the operation of a health care institution in Pikeville, Kentucky, providing in-patient and out-patient medical and professional care services. During the 12 months preceding the issuance of the complaint, in the course and conduct of its business operations, it derived gross revenues in excess of $250,000, and purchased products, goods, and materials valued in excess of $50,000 directly from points outside the Commonwealth of Kentucky. Respondent is now, and has been at all times material to this proceeding, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

II. The Involved Labor Orgnaization

The Union is now , and has been at all times material to this proceeding, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

The complaint alleges that Respondent has engaged in the following acts that are in violation of the Act:

1. Acting through Teresa Newsom, (a) discriminatorily removed union literature from Respondent's bulletin boards; (b) orally promulgated and thereafter maintained a rule prohibiting employees from talking about the Union except while on their breaks while permitting nonunion related discussions; and (c) orally promulgated and thereafter maintained a rule prohibiting empolyees from going to other floors in its facility to talk about the Union while permitting employees to go to other floors for other nonwork related matters. (CP 5(a)(1,ii,iii).)

2. Acting through Lloyd Price, solicited grievances from an employee in order to discourage employees' union activities. (CP 5 (b).)

3. Advised employees working as shift coordinators that they were supervisory employees without vesting them with any supervisory authority in order to discourage support for the Union among employees. (CP 5(c).)[3]

4. Acting through Lloyd Price, circulated an opinion survey among employees thereby, soliciting grievances of employees to discourage union activities. (CP 5(d).)

5. Acting through Cheryl Hickman, (a) coercively interrogated employees about their union activities and threatened employees with unspecified trouble if they signed a union authorization card; (b) coercively interrogated employees about their union activities; and (c) prohibited employees from discussing the Union. (CP 5(e)(i, ii, iii).)

6. Acting through Patty Akers, Judy Steffey and ohter supervisors, engaged in surveillance of employees' union activities and created an impression among employees that

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[3] The General Counsel withdrew this allegation at the hearing.

their union activities were under surveillance by Respondent. (CP 5(f).)

7. Acting through Lois Jones, restricted postings on employees bulletin boards and prohibited employee from discussing the Union thereby orally promulgating an overly broad, so-solicitation rule. (CP 5(g).)

8. Acting through Patty Akers, discriminatorily enforced Respondent's access policy to discourage employees' union activities. (CP 5(h).)

9. Acting through Judy Steffey, coercively interrogated an employee concerning the employee's union sympathies, threatened the employer with unspecified reprisals in the event that the employee continued to engage in union activities, and promised the employee possible promotions should the employee choose to refrain from union activities. (CP 5(i).)

10. Acting through its security guards and supervisors Cheryl Hickman and Ron Carter, engaged in surveillance of an employee to discourage employees' union activities. (CP 5(j).)

11. Acting through Dr. John Tummons, solicited employees' complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment to discourage employees' sympathy for and activities on behalf of the Union. (CP 5(k).)

12. Acting through Lloyd Price and John Tummons, solicited grievances from employees and promised to rectify certain problems to discourage employees from engaging in union activities. (CP 5(l).)

13. Acting through Maudie May, Carolyn Jones, Sally Stamper, Debra Battistelli, Jean Shakey, Betty martin, and Nina Reynolds and by paying the cost of mailing, assisted, supported, and approved of the circulation among its employees of a petition to dissuade the Union from seeking to represent Respondent's employees. (CP 5(m).)

14. Acting through Barbara Ratliff, (a) orally promulgated a rule prohibiting employees from talking about the

union except when on their breaks while permitting nonunion related discussions during nonbreak times, and (b) orally promulgated a rule prohibiting employees from talking about the union except when on their breaks while permitting nonunion related discussions during nonbreak times, and (b) orally promulgated a rule prohibiting employees from posting union literature on its bulletin boards while permitting nonunion related postings. (CP 5(n)(1,ii).)

15. Acting through Linda Saylor, orally promulgated a rule prohibiting employees from talking about the Union except on their breaks while permitting nonunion related discussions during nonbreak time and restricted the distribution of union literature to Respondent's coffeeshop and cafeterias. (CP 5(o).)

16. Acting through Ron White, impliedly threatened and employee who had been distributing union literature by asking her to identify herself and asking the location of her supervisor and created the impression that her union activities were under surveillance by Resp[ondent (CP 5(p).)

17. Acting through Tommy Williams and another security guard whose name is unknown, orally told employees that they could not distribute literature in its parking lots (CP5(q).)

18. Acting through Bob Ratliff, (a) orally promulgated a rule prohibiting employees from talking about the Union while eating lunch in the paint shop and threatened to prohibit employees from eating lunch in its paint shop to discourage employees' union activities, and (b) orally promulgated a rule prohibiting employees from posting union literature on their lockers and on bulletin boards while permitting nonunion materials to be so displayed. (CP 5(r)(i,ii).)

19. Acting through Romona Norris, created the impression that employees were being kept under surveillance because of their union activities. (CP 5(s).)

20. Acting through Phyllis Bowling, impliedly threatened an employee by telling her that from now on she should be nonunion. (CP 5(t).)

21. Acting through Dr. John Tummons, announced that on-call surgery employees would receive a 25-cent-an-hour wage increase in on-call pay to discourage employees union activities. (CP 6(a).)

22. Announced new benefits, including a dental plan, disability insurance, and increased base wage rate and a tax annuity savings plan to discourage employees from engaging in union activities. (CP 6(b).)

23. Respondent constructively idscharged its employee Phyllis (Gibson) Campbell. (CP 6(c).)

24. Respondent instituted changes in its job posting, vacation, and sick leave policies to discourage employees' support for the Union. (CP 6(d).)

25. Respondent gave an unsatisfactory evaluation to its employee Judy Webb. (CP 6(e).)

26. Respondent changed its policy regarding employee purchase of products and services to discourage employees' union activities, (CP 6(f).)

27. Respondent changed it birthday holiday policy to discourage employees' union activities. (CP 6(g).)

28. Respondent disciplined and changed the job duties of its employee Rapunzel Hall. (CP 6(h).)

29. Respondent discharged its employee Robin Gray. (CP 6(i).)

With respect to each separate issue framed by the complaint, I have noted the paragraph where the alleged activity is noted in the complaint. The complaint paragraphs are disignated CP followed by the number of the discussion is designated D, p., followed by the involved page number.

A. *Did Respondent Unlawfully Solicit Grievances from Employees and Promise to Rectify Problems in Order to Discourage Union Support?*

This discussion involves complaint paragraphs 5(b), (d), (k), and (l). Beginning the first week of August, respondent hired a consulting firm, SESCO, with the first task of

the consultant being to take a opinion survey of the Hospital's employees. Respondent contends that this survey could not be motivated by antiunion feelins as its inception predates its knowledge of the union organizing campaign. In this regard, the General Counsel contends that Respondent became aware of the campaign on July 30, when a list of employee organizers was attempted to be given to Dr. Tummons.. Amanda Hawkins, an LPN employed by the Respondent testified that she attended a meeting conducted by the Union on Sunday, July 29. This meeting was attended by a number of the hospital employees. She, along with several other employees, signed a list designating the Union's employee organizing committee. The list, marked General Counsel's Exhibit 10 in this record, contains the names of some 26 employees and is dated July 29. Hawkins testified that on Monday, July 30, she and some 15 or 20 other employees, took the list to Dr. Tummons about 8 a.m. He was not in his office so the employees waited for him and when he arrived, in the company of a Dr. Fannin, who worked at the Hospital, Hawkins handed him the list and told him they (the gathered employees) wanted the union to represent them. According to Hawkins, Tummons looked at the list and handed it back to her, saying he would have to talk with the lawyers. Hawkins also testified that about a week earlier, her supervisor, Shirley Coleman, spoke with some nurses on Hawkins shift, telling them that she had heard that union organizing or activity was going on in the Hospital.

After Tummon's refused to accept General Counsel's Exhibit 10, Hawkins took the list back to union organizer and representative, Ann Kempski, at a local hotel. Kempski said she would fax the list to Tummons.

Lisa Ann Smith, a RN at the Hospital, testified that she signed an authorization card in August 1990, but signed the organizing list on July 29. She attended the July 29 union meeting and Kempski told the employees there that the list would be given to Tummons the next morning.

She was not present for the confrontation with Tummons as she did not work the morning shift.

Marley Adkins is employed by Respondent as a maintenance technicial. He testified that he attended the meeting on July 29 and signed the list. He further testified that he was with the group of employees who presented the list to Dr. Tummons on the next morning.

Linda Gunnells, and employee of the hospital is July 1990, signed an authorization card on July 22. Her name appears on General Counsel's Exhibit 10.

Jeffrey Williamson was a staff RN at the Hospital in 1990, but had been promoted to a supervisory position by the date of hearing. He signed a union authorization card dated July 30. His name appears on General Counsel's Exhibit 10. He contends that he signed General Counsel's Exhibit 10 after he signed the authorization card, and he further contends that the list was presented to Tummons some weeks after July 30. In all other respect, however, his testimony corroborates the testimony of the other employees about the meeting with Tummons. He also testified that the Union faxed either a copy of General Counsel's Exhibit 10 or a later version of it to Tummons. Williamson admitted that he had a clear memory of events in 1990, but not specific dates.

Respondent introducted as Respondent's Exhibit 52 a copy of what purports to be Geneal Counsel's Exhibit 10, but with a fax notation across the top indicating the fax date to be August 12, a Sunday.

There is a question raised by the evidence about when Respondent became aware of the organizing effort of the Union. I believe that the best evidence would indicate that it was at the end of July rather than the middle of August. First, four of the five nurses testifying about the date of delivery of the list of employee organizers put it at July 30, and the one who put it later was admittedly fuzzy about dates. The nurses testifying as to the July 30 date were also apparently credible witnesses. Moreover,

Hawkins credibly testified that her supervisor indicated knowledge of the Union effort even before the list was presented to Tummons. Interestingly, as noted earlier, Mayor May testified that he reported to Tummons the existence of the union organizers sometime in the summer of 1990, putting the time somwhere in August or September. He did not indicate, however, that Tummons was aware of the effort at the time he informed him of the presence of organizer, so it had to be at a date preceding the delivery of the list of organizers.

It was shown that the last employee opinion survey commissioned by Respondent was taken in 1982. Because of the timing of the bringing in of the consultants, and the fact that such surveys were rare in the Hospital's experience, I find that the survey was in response to the organizing campaign. Personnel Director Juanita Deskins testified that SESCO was used during the campaign to oppose it, though she did not indicate knowledge that SESCO was initially hired for that reason. SESCO sent several employees to the Hospital, beginning August 5. These employees conducted an indepth survey of employee attitudes on virtually every aspect of their employment. Employees were interviewed on a one-on-one basis. Nurse Hawkins asked Lloyd Price, the SESCO official who was giving her the survey, why the employees were filing out the survey. He responded that it was to see what the problems were so they might work on them. She asked if there had not been a previous survey, and he answered that there had been one about 8 years before. He commented that nothing had ever come from that survey, but that Dr. Tummons was going to do something about the survey the employees were now taking. Price told nurses' aide Barbara Coleman that the survey was confidential and that its purpose was to better the working conditions and to find out what the problems were.

SESCO provided Respondents with the results of the survey on August 16. The cover letter, in part, indicates that the "Open Comments" section of the report "provides

much valuable information by providing a candid insight of the causes of possible dissatisfaction, complaints, and poor morale." It also indicates that the survey should provide "a 'springboard for action' that will lead to the improvement in employee attitudes, working relationships, morale, and an overall assessment/refinement to the worklife environment of your organizaiton. Through our follow-up recommendations which will follow, and your communications with your employees, may problem areas revealed in the survey can be pinpointed and corrected in very short order. We will look forward to helping you to identify these points of vulnerability and suggesting suitable solutions in our follow-up conferences."

As I have found that the survey was commissioned and taken after Respondent learned of the organizing campaign, that Respondent did not have a regular practice of taking such surveys, and as one of its agents. Lloyd Price,[4] informed employees that the purpose of the survey was to find areas of employee discontent and solve the problem, I find that it violates Section 8(a)(1) of the Act. *Whether Shield of Connecticut,* 300 NLRB 93 (1990); *Columbus Mills,* 303 NLRB 223 (1991); *Matheson Fast Freight,* 297 NLRB 63 (1989); *House of Raeford Farms,* 308 NLRB 568 (1992).

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[4] Price is alleged to be a statutory agent of Respondent as certain security guards employed by the Hospital. Respondent has denied this status. The Board has held labor relations consultants to be agents of an employer when those consultants engage in unfair labor practices on behalf of an employer. In the instant case, it is uncontroverted that Respondent hired SESCO to conduct its employee opinion survey, and that SESCO advised Respondent on its campaign to defeat the Union. Under such circumstances, Price, an employee from SESCO, is clearly an agent of Respondent. *Gourment Foods, Inc.,* 270 NLRB 578 (1984); *M. K. Morse Co.,* 302 NLRB 924 91991); *Blankenship and Associates,* 306 NLRB 994 (1992). Likewise, the Board has held that when security guards are employees by a respondent and in the course of their duties violate the Act, those guards are agents of the employer. *Southern Maryland Hospital Corp.,* 293 NLRB 1209 (1989).

I can find no compelling evidence that Tummons violated the Act independently by soliciting grievances and promising to remedy them as alleged in the complaint. There is evidence that prior to the organizing campaign, he had held meetings with employees and invited them to bring their problems and concerns to them. This, of course, is not unlawful.

B. *Did Respondent Unlawfully Change Wages, Benefits, and Working Conditions of Its Employees in Response to the Union Organizing Campaign?*

This discussion will involve complaint paragraphs 6(a), 9b), (d), (f), and (g). After the results of the survey were presented to Tummons, he conveyed the results to assistant administrators of the Hospital, noting that the survey uncovered a degree of unhappiness on the part of the employees. The assistant administrators were to study the portion of the survey relating to their departments to see how their departments fared. Thereafter, SESCO personnel met with management explaining the do's and dont's for management during the union campaign, advising them what they could say to employees about the Union. SESCO personnel were at the hospital for several months during the campaign. They assisted Tummons in preparing and issuing a number of letters or memos to employees opposing the union organizing effort. Typical of such memos is the following that was issued to employees by Tummons:

> As Anne Kempski and her Steelworkers Union supporters intensify their efforts to get you to sign one of their membership cards and turn you into dues payers, rumors, distortions and out and out misrepresentations are flying fast and furious. Here are just a few of the misrepresentations I have heard recently.
>
> Misrepresentation #1
>
> The Union will pay everybody's bills while they are on strike even if you don't pay union dues.
>
> My Comment
>
> I would be more than a little suspicious of this or any other union promise unless it was put in writing

and guaranteed by a responsible Steelworker Union official.

Misrepresentation #2

There will be a no strike clause in the union contracts so nobody will ever have to go out on strike.

My comment

This is a particularly interesting comment coming from the same union that also promises to pay all of your bills while you are on strike. When people don't tell the truth, it gets harder and harder to keep what they say straight and consistent. But beyond the obvious inconsistency here, no strike clauses can be negotiated into a contract, but they are only valid during the life of the contract. The problem is that the vast majority of strikes take place when contract negotiations have broken down or for recognition, not during the life of a contract and a no strike clause would be of no value in those circumstances.

Misrepresentation #3

The Steelworkers will "give" you the same insurance the miners have.

My comment

First of all, the Steelworkers don't and can't "give you anything. The Steelworkers do not provide paychecks or benefits or anything else. The hospital does. All the Steelworkers can do is ask. The hospital has always provided quality insurance coverage and there is not reason to believe that our insurance will not be improved in the future just as it has in the past, without the Steelworkers Union. This union promise is as worthless as any union promise that is not put in writing and guaranteed by a responsible union official.

Misrepresentation #4

The October wage and benefit package is out the window. You have to sign a membership card and vote for the union in order to get anything.

My comment

This is simply not true and I am amazed that anyone would make such a statement. The Board will

proceed to act on the proposed budget which includes pay and benefit recommendations.

Misrepresentation #5

You should sign a membership card and not discuss the signing of this card or any problems you may have with anyone other than the Steelworkers union and its supporters.

My comment

A person would have to be an excellent salesman to get me to sign a legally binding contract without shopping around and discussing it with someone knowledgeable on both sides of such an important issue. Also, when you sign a legally binding contract, they don't even give you a copy. The union is anxious to get your signature on legally binding documents, but they sign nothing and risk nothing. You Do!

Misrepresentation #6

The NLRB's regulations on "appropriate health care industry bargaining units: wiull not apply here. We will have one big union here for everybody.

My comment

Ms. Kempski is trying her best to confuse this issue. The only thing I have seen her offer as "evidence" of her position is a photocopy of a newsletter page from the Bureau of National Affairs (BNA) which is not a government agency, but a private for profit company that has absolutely no authority to speak for the NLRB or the courts.

Even Ms. Kempski's own "evidence" is far from the conclusive. In the second paragraph it ways that the NLRB's 8 bargaining unit rule will not be implemented until October (38 days from now). Ms. Kempski also conveniently overlooks the fact that it is the unions, including her own Steelworker's union that are fighting for implementation of the NLRB's 8 bargaining unit rule. In other words, by arguing for "one big Union." Ms. Kempski is arguing against the position of her own union.

Another interesting fact that Ms. Kempski ignores is the fact that RN's and other professionals have never been allowed to be in any bargaining unit that includes non-professionals unless they (the RN's and/or other professions) first have the opportunity to vote in a secret ballot election whether or not to be included in a non-professional unit. The current NLRB regulations just reinforce this pre-existing, long standing NLRB rule.

What I know to be true about appropriate bargaining units in health care is that in April 1989, the NLRB published its current 8 bargaining unit rules. The American Hospital Association appealed the NLRB 8 unit rules and in April 1990, the Seventh Circuit Court of Appeals denied the appeal. The AHA has appealed this ruling to the U.S. Supreme Court but it is not known whether or not the Supreme Court will even hear the appeal, let alone overturn it. Labor unions (including the Steelworkers) will be supporting the 8 bargaining unit NLRB rules as they did before the Seventh Circuit Court of Appeals, not the one big unit that Anne Kempski is promising.

Misrepresentation #7

If you feel you were lied to otherwise misrepresented when you signed a Steelworker Union Membership Card, Ms. Kempski will be glad to return it to you.

My Comment

I have been told that the first few people who got the real facts asked for their cards back were given them, but as soon as Ms. Kempski saw that the number of people asking for their cards back was growing, she changed her story. It appear that Ms. Kempski is no longer returning cards upon request. The Steelworkers are starting to play hardball. No more Mr. Nice Guy!

I will continue to give you as many facts as I can. I hope you will look carefully at both sides of this most important issue.

After the survey was taken, in addition to writing such letters to its employees, Respondent announced certain changes in wages and other benefits in August and implemented them in October. In October, the Hospital put in a different wage system and different fringe benefit plans. With respect to wages, it went from a grade and step structure to a base rate system. It added a dental plan to the benefits package, with the Hospital paying a part of the premium for hourly employees. It also instituted a long-term disability plan, again with a portion of the premium being paid by the Hospital for hourly employees. Additionally, it instituted a tax shelter annuity plan, as a supplement to the Hospital's pension plan.

Deskins testified that plans had been in the works for some time to institute these changes and that Tummons had given his approval to the changes and that Tummons had given his approval to the changes around July 30 or the first of August. Employees were notified of the changes at a meeting held by Tummons in late August. Prior to this time, employees were notified of wage increases by their department heads and/or by memo. Hospital employees had historically been given cost of living wage increases, usually in October.

The evidence indicates that on September 18, Respondent initiated a new policy whereby all employees would be notified of job vacancies. Respondent announced a policy to post all vacancies on the employee bulletin boards and in the personnel department. Alpha Carroll, who had first started working for Respondent in 1971, testified that from the time she started until the union campaign, the only place she ever saw job postings was in the personnel office. Rapunzel Hall testified that. "The whole time I worked there, I never saw a (job posting) until 1990, after the union came in." After the union campaign began, Hall Recalled that a hospital courier would bring around the job vacancy notices. Barbara Coleman had reason to be on the lookout for such postings because she was seeking transfer to another shift, but she never did see notices for job vacancies.

On October 7, 1990, Respondent also changed its policy on holiday bonus payments. This new policy gave the employees who worked the six national holidays a 50-percent bonus of their wage rates. Another change in the employees' working conditions was Respondent's decision to alter the method of payment of goods and services purchased from Respondent by the employees. For years prior to the organizing campaign, Respondent had permitted its employees to purchase small items such a prescription drugs, uniforms. In those years, the normal method for the payment of such purchasers was the execution of an authorization to take the cost of the goods out of the employees' paycheck. But, in October 1990, Respondent changed this policy so as to require that the employees would have to pay for the goods that cost $15 and under, and anything over $15 could still be deducted from the employees paycheck. It should be noted at this point, when considering all the changes the Respondent's administrator made, after the start of the union campaign, that none of these changes were sent to the city government for its review and/or approval. Deskins testified that all these changes were made solely by the administrator. Moreover, none of the many antiunion memos distributed to the employees during the period the Respondent allegedly committed the unfair labor practices here under discussion noted the Hospital's position that it was not subject to the Board's jurisdiction.

Respondent contends that the changes in working conditions first announced to employees in August 1990 could not be unlawful because they had been planned or decided on before the Hospital gained knowledge of the organizing campaign. In this regard it offered evidence that in April 1990, Tummons directed Deskins to revise the salary scale at the Hospital to a new base rate system of compensation. According to Deskins, Tummons outlined by hand the compensation system he wished to have in place for the succeeding fiscal year. Prior to that, Deskins had completed a phone survey of wage rates elsewhere. Deskins worked on the base rate project for several weeks concluding her ef-

forts in June 1990, before she went on vacation July 9. Deskins at another point in her testimony indicated that Tummons approved the new wage system around the first of August.

Respondent also points out that though the new pay rates for RN's amount to about 10-percent increase (to solve recruitment problems), increases for other employees is relatively marginal. The change in the on-call pay alleged to be unlawful occurred on July 10, a date in advance of Respondent's knowledge of union activity, and cannot be said to be an action taken in response to that activity.

With respect to the other changes in benefits, Respondent introduced evidence that quotes for a dental plan, disability insurance, and a tax annuity savings plan had been solicited from vendors and received in June and July 1990. Deskins testified that the decision to implement such benefits occurred in June, though there is no written document to support this. The correspondence from vendors does not make it clear that a vendor for the benefits program had been firmly selected by mid July. Respondent's Exhibit 29, dated in April, indicates that Tummons directed his then-personnel director to pursue additional employee benefits, including those granted in October, and to change the pay scale. The memo certainly supports Deskins' contentions that change in pay system and benefits were initiated and planned well before the union campaign began. As such plans were made before any knowledge of the campaign, and as they appear from the testimony and documentation to be decided on before that date, I find that their announcement and implementation after Respondent gained knowledge of the campaign does not violate the Act. *Whether Shield of Connecticut*, 300 NLRB 93 (1990); *American Sunroof Corp.*, 248 NLRB 748 (1980). It may be contended that the method of announcing the changes, that is, in employee meetings, rather than by memorandum as was the post practice, might violate the Act. The evidence reflects that Tummons, how-

ever, since his coming to the Hospital had held employee meetings to make announcements and thus, the practice of holding employee meeting for announcements predated Respondent's knowledge of union organizing activity.

I likewise agree with Respondent that the other changes in working conditions and benefits alleged in the complaint to have been unlawfully made are not unlawful under all the circumstances. The record in this case establishes that the Hospital has always had a written job-posting policy, the details of which have been amended periodically accommodate changes in the spatial layout of its operations. Thus, the hospital's revised policy on transfers, dated October 12, 1977, provided that, "The Personnel Department will post notices of vacant positions for dissemination to employees." At the time this policy was in effect, the Hospital's personnel office was located within the hospital facility itself. It was in early 1990, prior to organizing activity, that the Personnel Department moved to an off-site location on Chloe Road.

On June 27, 1990, the transfer policy, now termed "Change of Classification," was amended to state that "Vacant positions for which employees will be considered will be posted on the employee bulletin board beside the Cafeteria and in the Personnel Office," "for a minimum of three (3) days unless determined otherwise by the Personnel Office." There has been no tangible change in the Hospital's posting procedure. Superficial adjustment of the standard time for a posting, "unless determined otherwise," and identification of an additional location for posting placement necessitated by relocation of the personnel office, hardly affect terms and conditions of employment to any degree whatsoever, much less to a level that could be characterized as interference, restraint, or coercion of employees in the exercise of Section 7 rights.

Although certain witnesses called by the General Counsel claimed to have never seen a job posted at the Hospital "prior to the organizing campaign," at least one of his witnesses testified that she was job postings on the personnel

office bulletin board prior to its relocation, a fact confirmed by the introduction in evidence of several postings in evidence for the year 1989. These postings confirm that the 3-day durational requirement for postings, "unless determined otherwise " is consistent with the Hospital's prior treatment of this issue. Thus, an August 29, 1989 posting required action no later than September 1, 3 days hence. A July 11, 1989 posting for emergency room supervisor required action within 7 days. A May 1, 1989 posting for histology technical had a cut-off date of May 5, and a 2-week posting was specified in a February 24, 1989 posting for a vacant diet technical job.

As for the Hospital's vacation policy, there was a change that occurred during the organizing campaign. The change was minimal and for reasons that appear to me to be legitimate. The precise change is identified by comparison of subpart D of the June 27, 1990, and September 18, 1990 vacation policy revisions. That change is that while previously "No less than one day vacation may be taken at any time," following September 18 the minimum was "No less than four (4) continuous vacation hours." Rates of accrual and amounts of vacation entitlement were unchanged by the September 18 policy. Deskins testified about the Hospital's reason for this change in minimal authorized utilization. According to Deskins: "Where we had offered more flexible shifts, during that time . . . to enhance our recruiting ability—we had also discovered earlier in the year, that when employees were working twelve hour shifts, they were being paid twelve hours shifts, on holiday times. And, that is something—Dr. Tummons said, 'No, that is not how it should be'—that a holiday is given in eight hour increments. So, that was stopped earlier in the year, and then, this was put in place so that employees could take four hours of vacation, if they chose to—to make up the difference in the different hours, in the flexibility of shifts."

Here, as a recruitment too, the Hospital had previously offered flexible schedules involving 12-hour shifts, the economic consequences of which to incumbents, for holidays

and vacation days, was to lose 4 hours' earnings under the 8-hour pay limitations contained in the existing policies. To be able to avoid a reduction in pay for these individuals, the Hospital authorized, on September 18, a 4-hour incremental use of accrued vacation, to fully compensate an employee for a 12-hour day not worked, but compensable as a holiday or a vacation day.

There is no evidence that the change was in response to any preelection issue advanced by the Union, nor were the parties within the sensitive preelection period when in changes in employment terms are viewed more critically. The September 18 relaxation of minimal vacation utilization, without modification of accrual rates or amounts, occurred 6 weeks before the Union filed a petition in the underlying cases. I can find no causual connection between the union campaign and the vacation policy change.

There is an allegation in the complaint about a sick leave policy change in mid September 1990. No evidence was offered in support of this allegation and it will be dismissed. With respect to the payroll deduction practice. Thelma Vinson, the management official in charge of the Hospital's payroll operation, testified about the change. prior to the fall of 1990, employees were permitted to "[c]ome in to the pharmacy, materials and management, or any place that they could get a service, or something that they needed-sign a payroll deduction, state how much they wanted to have taken out each pay (period), and, then, that little slip of paper would come over to payroll, and, they would manually input those deductions, ever how small they (employees) wanted them to be—to come out of their pay.."

> [P]harmacy . . . medications are expensive, and, they would be more than what their paycheck is . . . and they were stretched out over—you know—five, six seven eight, nine, ten—whatever they wanted—and, try to get it down to like five dollars, six dollars, seven dollars. They would take small purchases and try to stretch it out, and, just have fifty cents taken out of pay, or a dollar, or something. You would go

> both directions. You would go from extremes, to small things, which is still time consuming, because everything had to be manually imputed.

The payroll deduction purchase practice had not, until 1990, ever been reduced to writing and was not uniform. Different departments within which purchases were made did different things. In response to the burden of processing these items, and in conjunction with the implementation of a new automated system for payroll, a decision was made to standardize the employee payroll deduction purchase practice. Thus, in October 1990, a general policy with respect to employee purchases through payroll deduction was instituted whereby a floor of 15 percent of the indebtedness, or $15, whichever was higher was deducted each pay period.

There is not connection between employee organizing activity and the change that is the subject of this allegation. To the contrary, the Hospital's business interest in standardizing its unwritten payroll practices to reduce clerical time expended performing these tasks, all in conjunction with the introduction of a new automated payroll system, seem to me to establish that the campaign was of no consequence to the action taken. Moreover, this change in practice would likely be viewed as an adverse change by employee and not one which would reduce their union support.

For the reasons set forth above, I find that Respondents did not violate the Act as alleged in complaint paragraphs 6(a), (b), (d), (f), and (g).

C. *Did Respondent Unlawfully Discriminate in the Enforcement of its Posting and Distribution Rules?*

This section discusses complaint paragraphs 5(a)(i), (g), (n)(ii), (o), (q), and (f)(ii). On June 27, 1990, before the advent of organizing activity. Respondent amended its existing solicitation policy to specifically provide:

> Any written material to be displayed in the Hospital must be approved by the Personnel Director or Administrator. Unless specific permission is obtained, such display is in violation of Hospital policy.

Prior to June 1990, the Hospital maintained a no-solicitation policy which, but for the above-quoted passage, was virtually identical to the most recent republication. The General Counsel does not contend that the rule as promulgated is unlawful, rather, that discriminatory enforcement of the policy by the Respondent violated the Act.

A number of employee witnesses testified that Respondent allowed the posting of personal, charitable, and otherwise nonwork related material on the Hospital's bulletin boards after the promulgation of the revised no-solicitation rule while enforcing the policy with respect to the posting of Union related material. The Hospital maintains a number of bulletin boards, including one in personnel, one beside the cafeteria, and one in each patient care area. Employee Alpha Carroll testified that prior to the union campaign, employees on her floor posted on that floor's bulletin board wedding announcements, revival announcements, postcards, and jokes. She further testified that on August 1, a list of the employee union organization was posted. Carroll's supervisor, Teresa Newsome, observed the list and removed it. On cross-examination, it was pointed out that Hospital's records revealed that Carroll was not working on August 1. Carroll stated that she may have been wrong about the date, but not the incident. Newsome admitted that on or about August 20, she removed a union organizing committee list, simultaneously removing a church revival notice. Newsome further testified that although she removed the postings, she did so because they violated hospital policy and that she routinely does so when she discovers nonhospital business materials, which she has observed in the form of wedding announcements and baby showers in the past.

Employee Amanda Hawkins testified that on her floor, at the outset of the union campaign, there were posted on the bulletin board wedding invitations, shower invitations, postcards from vacationing employees, and newspaper wedding announcements. She further testified that prior to the campaign, employee were not required to get permission to post such nonwork related items nor were they told

not to post them. On about September 18 or 19, Hawkins' supervisor, Shirley Coleman, told a group of nurses in their lounge that there was to be no more announcements posted on the bulletin board. Though Hawkins was aware of the Hospital's long-standing written policy about postings, she testified credibly that they were not enforced until Coleman's announcement in September.

Employee Barbara Coleman testified that she had observed nonwork related material posted on the Hospital's bulletin boards by employees since she started working at the Hospital in 1989. To the best of her knowledge there had never been a requirement to get permission to post such materials. Similar testimony was given by employees Rapunzel Hall, Ruth Thacker, Bruce White, Linda Gunnels, and Jeffrey Williamson. Employee Lisa Smith testified that she had put up union literature on the nurses lounge bulletin board. On August 19, Supervisor Lois Jones came to the sixth floor and held a meeting with the employees near the nurses station. Smith recalled that Jones announced to the employees they could no longer post anything on the bulletin board, and mentioned union literature specifically. Barbara Coleman was given a similar message by Smith. Linda Gunnels testified that Jones gave the same prohibition about the use of the bulletin boards. Ruth Thacker, an employee in the medical records department, testified that she asked her supervisor, Barbara Ratliff, in the latter part of October if she could postunion literature and was told no by Ratliff.[5]

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[5] Pars. 5(s) of the complaint alleges that on October 26, Supervisor Ramona Norris created the impression that employees were being kept under surveillance. The only testimony supporting this allegation that I can find in the record is Thacker's testimony that after Ratliff told her that she could not post union literature on the bulletin board, she observed Norris check the bulletin board three times the same day. Assuming this is the evidentiary support for the involved allegation, it is not sufficient to prove a violation of the Act. I will recommend dismissal of this complaint allegation.

Respondent's employee Marlie Adkins was employed as a maintenance helper in 1990, and his supervisor was Bob Ratliff. He testified that on October 16, he was eating lunch in the Hospital's paint shop with four other employees when Ratliff and two other supervisory employees came in the shop. According to Adkins, Ratliff proceeded to take down literature that was posted on a cabinet in the shop, stating that the cabinet was not a bulletin board. He then told the employees eating lunch that he knew that they were talking about the Union and if it did not stop, he would padlock the shop and they could not eat lunch anymore. The material Ratliff removed from the cabinet included both pro- and antiunion literature, work schedules, and comics. He then told Adkins that Adkins had lied to him about taking Adkins name off the list of employee union organizers. Adkins said he had not lied, and that of he had known it was going to make Ratliff so mad, he would have not signed the list in

* * * * *

Justice, and Cristine Taylor) getting just one such ranking a piece.

Williamson's handwritten comments on the back of Webb's September 9 evaluation is a vague reference to Webb's recent activities 1 day earlier. In his comments Williamson admonishes Webb to "stop creating antagonism in the laboratory and with other hospital personnel." Webb testified that Williamson explained that she had been antagonistic toward fellow employee Angel Little. Webb remembered calling Little at her home and talking in favor of the Union. Williamson also wrote that Webb "has been very critical of these policies," referring to hospital and laboratory policies and that she should "be a team player." In addition, Webb remembers that Williamson explained to her three "poor" job performances by Webb. Neither Williamson nor any other supervisors had ever voiced any criticism to Webb about any of these incidents until the September 9 evaluation meeting.

Williamson did not testify in this proceeding. Respondent's primary defense against the allegations of discrimination against Webb in the evaluation given her on September 9 is that the evaluation was prepared on September 7, the day before she wore her union button. Not only can I not be certain that that was the date the evaluation was prepared as Williamson did not testify, but it is clear from Webb's uncontradicted testimony that Williamson was aware of Webb's union sympathies far before she wore the button. Based on Williamson's knowledge of her union support, the lack of criticism of her work at the time her alleged poor performance occurred, the drastically worse evaluation given her after her union support became known as compared with earlier evaluations, and the seriousness with which Respondent treated the wearing of the union button, I find that Respondent gave Webb the poor evaluation in order to discriminate against her for her union support, in violation Section 5(a)(1) and (3).

E. *Did Respondent Unlawfully Interrogate, Threaten, Suspend and Discharge Robin Gray Because of Her Union Support?*

This section discusses the allegations contained in complaint paragraph 6(i). It also discusses complaint paragraphs 5(a)(i), (ii), and (iii), and 5(t), as the allegations in those paragraphs relate to Robin Gray. Robin Gray was employed as a ward clerk in the neo-natal intensive care unit from when she was hired in October 1989 until her suspension on November 8 and discharge on November 14. On August 4, Gray signed a union authorization card.

Her immediate supervisors were Brenda Chapman and Phyllis Bowling. They in turn reported to Cheryl Hickman. About a week after she signed the authorization card, she had a conversation with Hickman in the presence of other employees in the unit. Hickman asked if any of the employees had signed authorization cards and two other employees said they had not. Gray volunteered that she has signed a card. Another employee also acknowledged that

she had signed a card, but wanted it back. Hickman advised this employee to send a certified letter to Union Organizer Kempski.[7] Hickman told the employees that the Union was trouble and only wanted in the Hospital to collect the dues the employees would pay. She also indicated that if employees signed cards, it was trouble.

The next day, Hickman asked Gray if she had gotten her card back and Gray said no. Gray indicated Hickman asked her this question a number of times over the next 2 days.

About the end of August, Hickman has a meeting in the unit with Phyllis Bowling, Kay Thornberry, and Gray. She told them not to discuss anything concerning the Union anymore because it was disruptive with the other employees. After the meeting, she called Gray aside and told her specifically not to discuss the Union with coworkers as it was disruptive. Gray asked if this admonition was related to an argument she had with coworker Nicki White. a day or so earlier, she had had a conversation with White wherein White had expressed her antiunion feelings and Gray her prounion sentiments. Hickman again told her not to discuss the Union. As alleged in the complaint, I find the repeated questioning of Gray about her union authorization card, coupled with the admonition that signing such a card could be trouble is clearly coercive and has the clear intent of restraining employees in the exercise of Section 7 rights. Accordingly, I find that Hickman's interrogation of Gray and her fellow employees to be in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraphs (5)(e)(i), (ii), and (iii). As I note below in connection with the entire manner of Gray's discharge. I credit her testimony over that of witnesses presented by

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[7] Coworker Mitzi Thacker remembers Gray saying that she wanted her card back. This does not square with Gray's uncontradicted testimony of Bowling's subsequent threat that continued union support could lead to trouble.

Respondent, and do not credit more innocuous versions of Gray's interrogation or Hickman's other antiunion statements found in this record. Gray was a very credible witness and her testimony is fully supported by the actions taken by Respondent against her. I also find that Hickman's prohibition against Gray discussing the Union to be violative of the Act, when no other topics of discussion among employees were restricted. The prohibition is even more coercice when one considers the fact that Gray's "disruptive" union support surfaces shortly thereafter as a negative factor in her annual evaluation.

On October 26, Gray was given an evaluation that reflects satisfactory performance. It comments, however, that "improvement must be shown with her interpersonal relationships with co-workers, especially due to NICU being a small unit where everyone has to work so closely." This was signed by Hickman. Gray commented on the form, "I feel that all the blame was not shared equally. I also feel that I did get along well with my co-workers." The evaluation was given to Gray by Bowling. After showing her the evaluation , Bowling took it to Hickman. Later Bowling returned to Gray with the evaluation, stating that Hickman had said the evaluation could not go through with Gray's opinion on it. Bowling added that "as a friend from now on I had better be antiunion because my job could be replaced by someone from the street."[8]

Gray's last day of employment at the Hospital was November 8. On the day before, she had lunch in the Hospital cafeteria with Brenda Chapman. Her lunch break was for 30 minutes, which is unpaid. She testified that she went to lunch on November 7, about 12:55 p.m. and spent about 15

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[8] I find this uncontradicted threat by Bowling to be coercive in the extreme as it threatens, prophetically, Gray's continued employment. Accordingly, I find that Respondent has violated Sec. 8(a)(1) and (3) by Bowling's threat as alleged in complaint paragraph 5(t). *Pony Express Courier Corp.*, 283 NLRB 868 (1978). Quemetco Inc., 223 NLRB 470 (1976).

minutes in the cafeteria. She had called a local store earlier in the day to ascertain if some photos of hers' that they were processing were ready, and be advised that they were in. When she left the cafeteria, she returned to her unit and asked Mitzi Thaker, a part-time RN in the unit if it would be okay to go to the store and get the photos. Thacker said it would be okay. She also mentioned that she was going to the store to shift coordinator, Brenda Chapman, who had no objection. According to Gray, Chapman said nothing about clocking out. According to Chapman, she said that Gray could go, "as long as she clocked out and back in."[9] Gray placed the time at this point at about 1:15 p.m. She then left the Hospital without clocking out, went to the store, got her picture, and returned to the Hospital. She did not clock in on her return. Her estimate of time she was gone was approximately 25 minutes. Chapman estimated that it was about 45 minutes.

Upon her return to her unit, Gray was informed by Thacker that Gray was wanted to work the desk on the fifth floor. Brenda Chapman was also present and gave her a friendly goodbye as Gray left the unit. She went to the fifth floor and worked there the rest of the day. No one said anything to her about her trip to the store and failure to clock out and back in that day. Thacker testified that while Gray was gone to the store, she became curios about how long she had been gone as the fifth floor had made two requests for Gray to come work there. She testified that she went to where Gray's timecard was kept and discovered that she did not clock out. Thacker, without saying why, told Hickman she should check Gray's card. Hickman

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[9]Thacker, a supervisor, remembered both Hickman, on November 5, and Chapman, on November 7, telling Gray to clock out and back in. Another RN in the unit, Gwen Durkey, also testified that she heard Gray receive permission to leave on both occasions, and remembers Hickman telling gray to clock out on November 5, but not Chapman saying that on November 7.

testified that she attempted to do so about 3:30 that day, but that timecard was mysteriously missing. Chapman testified that she saw Gray leaving work that day and asked Gray if she had clocked out and back in that day, because Hickman "told me to make sure I reminded her." According to Hickman, Gray replied that she had forgotten to clock in and out Chapman told her she could " write it in, date it... and sign it."

Hickman testified that she returned to the unit that evening and discovered Gray's timecard still missing. The next day she found the time card back in its slot, but the card did not reflect Gray's trips on November 5 and 7. Hickman testified that she took the card to Carter, she had already spoken to carter the previous day about the card's disappearance.

On November 8, Gray reported to work at 7 a.m. , and was assigned to the desk on the fifth floor , working there until 2:30 p.m. At that time she was instructed to report to the Hospital office. She went there and met with hickman, and the Hospital's assistant administrator, Dorothy Carter. Hickman, said there was a problem with Gray's timecard, that Brenda Chapman had told her to clock out for her trip to the store the day before, and that she committed a Federal offense by falsifying her timecard.

Gray responded that she did not hear Chapman tell her to clock out and offered to correct her timecard. Carter said it was to late and Gray would be sent home without pay while the matter was investigated. According to Gray, Hickman noted that Gray had permission from Chapman to go to the store, but was guilty of not clocking out and in.

On November 13, Hickman called Gray and told her to report to Carter the next day. On November 14, Gray met with Carter, Hickman, and Deskins. Deskins said they had investigated Gray's timecard and the Hospital was going to dismiss her for insubordination. Gray said other employees were what she had done all the time without being disciplined. Deskins responded that anyone caught doing the same thing would be terminated. Gray had never be-

fore been disciplined for anything. According to Gray, the first time she was told that she should clock out for leaving the Hospital to run an errand was at her suspension on November 8.

She left the Hospital on November 5, to sign a mortgage note and was gone for 15 minutes. On that occasion, she asked permission from Hickman and received it. According to Gray, Hickman said nothing about clocking out. Hickman testified that she reminded Gray to clock out, but did not check her timecard upon Grat's return to see if she had done so. Gray also recounted an incident on September 19, when she and Bowling went to the bank to cash payroll she was gone 20 minutes that time. Nothing was said to her on this occasion about clocking out. She remembered other occasions when she ran errands for the unit without clocking out, with the knowledge of unit personnel. She noted that employee Niki White had left the hospital in May to get a dress for daughter, with Brenda Chapman's permission. Gray overheard White ask if she had to clock out and Chapman told her no.

On those occasions when Gray has forgotten to clock in when reporting to work or clock out when leaving, she had corrected her timecard later. She had never been told to that failure to clock in or out for short errands could result in discipline, including termination.

Respondent terminated Gray for "Violation of Hospital Policy-Category I Offense." For some time the Hospital has had a written policy requiring, inter alia, that "If it is necessary for an employee to leave the Hospital before completion of the shift he/she will check out upon departure." The Hospital's most recent policy, dated June 27, 1990, states additionally, that "falsification of time and attendance records are serious violations of Hospital Policy" for which "Offenders will be subject to severe disciplinary action and possible prosecution." Since at least 1981, the Hospital has likewise, maintained a written disciplinary action policy which prohibits, under penalty discharge, "Willful insubordination" and "Falsification of any reports, records, or information."

To the extent that there are credibility differences between Gray and other witnesses testifying about the circumstances of her discharge. I credit Gray. The General Counsel had proven that there existed animus toward Gray because of her union support, and the actions of Hickman, Chapman, Thacker, and Carter with respect to the events in question appear to me to be an attempt to find a way to get rid of Gray. Having observed Gray, I find it unbelievable that she would not have clocked out and in on the dates in question if she were told to do so. This especially true if one believes Brenda Chapman's testimony that she told her to correct her timecard as she was leaving work on November 7.

It is not as if Gray were getting away with something. Hickman and Chapman had given their permission for Gray to leave the Hospital to run errands on November 5 and 7. Neither the matter of her being away from work or the duration of her absence was of concern to them. The total amount of money the hospital was out, if Gray had got away with not clocking in or out was less than $10. Yet for this minor amount of money, Gray was not confronted by Hickman on November 7 or 8 and warned of the potential consequences of not clocking out and in, or told to correct the card; instead, Hickman went on November 7 and 8 to the Hospital's assistant administrator, who waited until the end of Gray's shift and then effectively terminated her. The Respondent officially suspended her pending investigation, but what was there to investigate? Hickman knew on November 7 that Gray had not clocked out and in on November 5 and again on November 7, she had already spoken to Chapman about it on November 7. If Hickman instructed Chapman to be sure to tell Gray to correct her card on November 7, why would she not be willing to let Gray make the correction on November 8. Gray was an employee without prior discipline on her record and had just received a satisfactory rating on her work duties. I do not believe that Gray was told to clock in or out on the dates in question and do not believe that she was given the opportunity to correct her card as indicated by Chapman.

I believe and find that Gray was discharged because of Respondent's union animus and for no other reason. No other hospital employee had been discharged for a similar offense in over 15 years, though there is ample credible evidence that it was common for employees to leave the Hospital for short periods during the workdays without clocking in or out. Hickman and Chapman admitted that they never warned Gray of the possible consequence for failing to clock in or out. Gray credibly testified about other instances in which she and other employees were allowed to leave the premises for errands and not clock in or out. Her testimony is buttressed by the fact that her timecards throughout her entire employment disclose only one occasion, in her first week of employment in October 1989, when she clocked in and out during working hours. On that occasion, Gray's timecard was corrected to indicate that she should be paid for her 28 minutes absence. As I noted above, I find the true motivation for discharging Gray was for her union support and the reasons given by Respondent are purely pretextual. Given the Hospital's demonstrated lax treatment of employees not clocking in and out to run short errands, and the matter of being gone from work is not of concern, and the failure of the Hospital to discipline any other employee for similar action, I do not believe the Hospital has demonstrated that it has any legitimate reason for its actions, and certainly has not demonstrated that it would have taken the same action absent Gray's union activity. Accordingly, I find that Respondent has violated Section 8(a)(1) and (3) of the Act. See *Wright Line,* 251 NLRB 1083 (1980).

F. *Did Respondent Discriminatorily Issue Rapunzel Halla Written Warning and Change Her Job Duties Because of Her Activities in Support of the Union?*

This section discusses complaint paragraph 6(h). Rapunzel Hall went to work for Respondent in August 1985 and has worked there ever since, as a pharmacy technician. Her performance evaluations both before and after the incident in question show her to be an excellent em-

ployee. On August 20, Hall became involved in the Union for the first time by signing an authorization card. Thereafter, she participated in handbilling outside the Hospital with other employees. Then, on November 1, Hall was given a written reprimand and her job duties, which she testified that she liked very much, were changed.

The situation that Respondent contends caused the warning to be given began in the fall of 1990, when the Hospital discovered a major inventory shortage in floor stock medications and supplies stored in the pharmacy. The shortage was brought to the attention of Pharmacy Director Pat McCoy in a meeting with the Hospital's chief financial officer, Norris, and controller, Vinson, on October 23.. To ascertain the source of the shortage, McCoy was instructed to retrieve all of the requisitions, called "green sheets," from throughout the past fiscal year, reflecting the request for and dispensation of floor stock items to the other areas of the Hospital.

Hall, who was solely responsible for the processing and monthly summarization of all green sheets, explained the process she goes through in keeping track of floor stock. In summary, on a monthly basis, she inputs the data from individual green sheets, including the item requisitioned, its cost, and, inter alia, the department that received the item. Some floor stock items are charged, for accounting purposes, as pharmacy charges, while others are simply floor-absorbed charges, referring to patient care areas. this data is entered into a "dummy" file in the computer, meaning that it is not accessible or stored anywhere else, whereupon Hall delivers this printout or report, by hand, to McCoy or her secretary, Verda Prater. The report is due 4 days after the close of each month. At the end of the fiscal year, the dummy file is purged. As clarified by McCoy, Hall's monthly summaries are translated by Prater into a handwritten report that McCoy later signs and is then transmitted to the accounting department. McCoy does not compare Hall's dummy file printout to the handwritten translation prepared by Prater in the ordinary course of business.

Following her meeting with the Hospital's financial officers on October 23, McCoy returned to the pharmacy at 6:30 p.m. and instructed the hourly employees, called technicians, to begin a recomputation of pharmacy floor stock dispensations for the entire fiscal year, starting "from scratch" with the green sheets. McCoy stressed the need to complete the project as quickly as possible and to utilize all overtime necessary.

Overnight, it occurred to McCoy that perhaps the information she had instructed the technicians to regenerate remained in the dummy file on the computer as generated by Hall. Incredibly, it did not occur to her that this very same information was readily available from the reports that Hall gave to her on a monthly basis. In any event, according to McCoy, she asked Hall the next morning if it were possible to retrieve the reports from her files and Hall replied that her files had already been purged. The Hospital's fiscal year had just ended. Hall did not mention the printed reports she generates for initial transmission to McCoy and Prater. If one believes McCoy, presumably, Hall did not think Hall would ask for a new printout if she still had the report Hall had given her. Hall credibly testified, however, that she asked McCoy why the employees were regenerating information that she had already given McCoy in the monthly reports. According to Hall, McCoy asked if she could retrieve the reports from her computer and she informed McCoy that the information had been purged in the ordinary course of business.

McCoy tells a slightly different version. She testified that the next day, October 25, she asked Hall what she did with the information once it was entered into the computer. For the first time, Hall told McCoy, her immediate supervisor and the recipient of the monthly reports, about the monthly reports and informed McCoy that she should have the information in her possession. McCoy began a search for the reports and ultimately found them, misfiled in her office. She described her office thusly, "It was—my office is more like a store room, than an office. It is very

cluttered . . . It was in a group of other generated documents, that all from the inventory—that came from the inventory side, from the data processing."

McCoy, on locating the printouts, informed the technicians that she could not believe that all the overtime had been expended trying to reproduce what was already in the reports. She claims Hall smiled and said, "Well, it was a waste of time, want's it." Hall denies this comment, and I credit her denial. Hall was a very credible witness and observing her, I simply do not believe that she made the remark attributed to her or for that matter is capable of making such a sarcastic remark.

McCoy testified that she concluded that Hall had misled her by not revealing the existence of the printouts earlier in the process. In a memo to Deskins, McCoy reported the events that had occurred and the basis for her belief concerning Hall's lack of cooperation. In part, she wrote: "Rapunzel Hall clearly answered each question with an answer, however, not the appropriate answer. She answered my questions, but avoided divulging any information that would assist in the effort, and dilemma we were in. Her 'non-participatory' answers delayed our report and cost the hospital in over-time expenses and many [sic] unproductive work by salaried employees. She did not answer any question openly, honestly, or explicitly."

On November 1, Hall was given a written reprimand and the job function of putting the green sheet information on the computer was given to another employee. According to the Pharmacy Manager Roy Reeser, Hall stated to him at the time when the warning was given, "If I had known what you wanted, I would have given it to you." The warning, in my mind, clearly indicates that McCoy believed that Hall's union support played a part in the October incidents. It reads:

> As director I must maintain the integrity of the pharmacy and its position within the hospital structure. I can not, and will not tolerate behavior that is clearly intended to undermine the integrity of the phar-

macy department and its function within the Hospital. Specifically, I cannot and will not countenance behavior which attempts to walk a fine line between the letter and the spirit of our disciplinary policies and generally accepted standards of behavior. Through what was clearly dishonest and insubordinate omission on your part the hospital was forced to unnecessarily spend up to $1,000 or more in overtime pay not to mention inconvenience to many salaried employees.

You clearly chose not to retrieve information which resulted in both overtime and other costs to the hospital and a delay in closing the books for the fiscal year ending September 30, 1990.

Allowing you to remain in your present position would not only jeopardize your career here at the hospital, but would clearly not be in the best interest of the pharmacy and ultimately the hospital.

Therefore, I'm removing you—effective immediately—from all Inventory Related activities. Your new assignment will consist of technical duties with an emphasis on out-patient pharmacy.

Not only do I expect you to follow the letter, but I also expect you to follow to the spirit of Hospital Policies and Procedures. I require from you an immediate and ongoing improvement, in your cooperation with me and other supervisory and non-supervisory hospital employees and your support of the hospital.

I will not tolerate:

Dishonesty

Insubordination

Refusal to obey reasonable instructions

(All of the above either by omission or commission)

I expect you to fulfill your duties in the same manner as I expect all other pharmacy employees to fulfill theirs. Additionally, I expect you to cease disruptive behavior which

has the effect of interfering with the work performance of other employees.

It is clear from the evidence that Hall absolutely nothing wrong. The fact that her supervisor, McCoy, did not remember that she was in possession of the information that she ordered employees to work overtime to regenerate cannot conceivably be Hall's fault. If fault is to be placed, it is clearly that of McCoy. I also do not credit any of McCoy's attempts to read any sarcasm or willful lack of cooperation or insubordination into Hall's interaction with her during this incident. Hearing McCoy testify, and then reading the warning notice, it becomes clear that McCoy wanted a reason to threaten and discipline Hall without regard to the inventory situation. There is no evidence of any "disruptive behavior" by Hall, or any lack of "support" for the Hospital, except for her union activities. I believe and find that the warning given to Hall and her change in job duties was solely because of her union activities and not for the pre textual reasons give. I find that the warning and job change are actions in violation of Section 8(a)(1) and (3) of the Act. *Thurston Motor Lines,* 263 NLRB 1101 (1982); *Gulf Envelope Co.,* 256 NLRB 320 (1981); and *Luk, Inc.,* 255 NLRB 976 (1981).

G. *Did Respondent Constructively Discharge Phyllis (Gibson) Campbell Because of Her Union Support and Activities?*

This section discussing complaint paragraph 6(c) that alleges that on or about August 13, 1990, the Hospital constructively discharged Phyllis Campbell[10] Campbell first came to work for the Hospital as a nursing assistant in 1968, a position she still held in 1990. She had been one of the strikers in the 1970's strike and was reinstated in 1981 after the issuance of a Board Order.

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[10] At the time that the events in question occurred in 1990, the alleged discriminatee's name was Phyllis Gibson.

Campbell worked on the Hospital's fourth floor in 1990, assigned to the first, or 7 a.m. to 3:30 p.m. shift. Her immediate supervisor at the time was Teresa Newsom, Newsom as, and is, the unit manager for the telemetry unit located on the Hospital's fourth floor. Newsom has worked at the Hospital for 14 years, having held management positions since 1983. Newsom was responsible for the work schedule of employees assigned to the fourth floor. She prepares 4-week schedules for fourth floor personnel, which are published before the expiration of the current schedule and were, in the fall of 1990, posted on a bulletin board at the nurses' station. As a matter of scheduling policy, employees have been instructed by Newsom to advise her of requests for specific days off not later than the third Monday of the current schedule. Campbell knew of and had conformed to this scheduling policy in the past.

The events leading to Campbell's leaving the employ of the Hospital as described by Respondent's witnesses follows. On August 9, at about 9:30 a.m., Campbell paged Newsom on Newsom's pager, Newsom returned the call from the nursing office and, in conversation with Campbell, was informed by Campbell that she needed August 22 and 23 off from work because her son was having surgery. Newsom inquired about the nature of the surgery and was informed that it was elective, and that her insurance carrier had preapproved the surgery through August 23. Newsom also learned from Campbell that her son's surgery had been pending for 3 months.

Newsom told Campbell that she was "downstairs" but that she would call her back after checking the schedule. Newsom checked the schedule and called Campbell, informing her that there "was not enough personnel on the floor" to allow her to grant Campbell's request to be off on August 22 and 23. Newsom asked Campbell to see if the surgery could be rescheduled for another 2 days and to call her back. Gibson said, "fine" and hung up.

Campbell did not call back, instead approaching Newsom at the fourth floor nursing station the next day,

Friday, August 10. While standing in the vicinity of the telephone, Campbell told Newsom that she had the says changed to August 16 and 17, and asked Newsom to check the schedule to see if Newsom could allow Campbell to have those days off. Newsom and Campbell checked the schedule and Newsom told Campbell that she could have a vacation day on Thursday, August 16, Newsom asked Campbell if she could trade shifts with someone else on Friday, however, because there were not enough people scheduled for Friday Campbell said she would try to trade with someone.

On Monday, August 13, Campbell came to Newsom's office during the morning hours. Campbell was upset. Campbell confronted Newsom and told her that she was going to have to quit. Newsom asked why and Campbell informed her that she could not get anybody to trade shifts with her so that she could have Friday, August 17, off. Newsom told Campbell to wait that they needed to talk about the matter further, but that a witness was necessary. The two of them proceeded to the first floor nursing office, with Campbell complaining about the unfairness of the situation and the importance of her son's surgery.

No one was in the nursing office when Campbell and Newsom arrived, so Newsom suggested that they go to Shirley Coleman's office on the fifth floor. When arriving there and locating Coleman, Newsom explained to Coleman why they were there and explained the problem. Campbell said she had not been able to trade shifts. Coleman asked if she had tried any of the other shifts. Campbell said she did not know she could do that. Newsom asked Campbell what her off-day was so that they could see about trading. Campbell said that "today was her off day and that she had come to work so that Newsom could give her another day off. Newsom told Campbell that it looked like she was going to have to give her another day off. Newsom left and went to the nursing office. Shortly thereafter, Campbell left telling Coleman that she was going back to the fourth floor. Coleman joined Newsom in the nursing office be-

cause she felt that Carter needed to know what was going on on her floor.

While Newsom and Coleman were explaining to Carter what had just happened, Campbell came into the office and requested a resignation slip. Carter asked what was the matter and Campbell shad she was just going to have to quit because she could not get off for her son's surgery. Newsom and Coleman left the nursing office at that point. Shortly thereafter, Carter called Coleman and asked her to return to the nursing office, that Campbell had resigned, and requested Coleman escort Campbell to the fourth floor to collect her things.

In the resignation signed by Campbell, dated August 13, she stated her reason for leaving: "I quit because I feel I am unfairly treated."

Campbell's version of the events in question shares only the foregoing reason for leaving in common with Respondent's version. The following is her description of the events that led to her leaving her employment. She began her testimony by relating the substance of an alleged earlier conversation with Newsom, that is the subject of independent complaint paragraphs, specifically, paragraphs 5(1)(i), and (ii), and (iii). Campbell testified that on August 1, she, two other employees, and Newsom had a conversation at the nurses' station. According to Campbell, Newsom told the employees that she was against the Union and that the employees were not "to go to other floors and discuss anything. That we're not allowed." Campbell testified that Newsom restricted conversations about the Union only to breaks away from the floor and at lunch. According to Campbell, prior to this date, she and other employees were allowed to go off their floor on breaks. She also testified that thereafter, another employee voiced antiunion statements while working. There was no showing that this statement was in the presence of or overheard by a supervisor, however, Newsom flatly denied making these statements. Based on my credibility findings with respect to Campbell, I will not credit her testimony about Newsom's

alleged restrictions. At least two other employees employed on the fourth floor testified in this proceeding and neither corroborated Campbell's assertions in these regards, though one of these, Alpha Carroll, was a staunch union supporter. Campbell signed a union authorization card on August 6, and obtained the signature of other employees on several more.

The surgery required for her son had to be performed in Lexington, Kentucky, and Campbell was informed by the surgeon that it would be done August 14 and 15. To get time off to be with her son, Campbell phoned Newsom on August 9. Newsom would not talk with her saying she did not have the time. Campbell called Newsom again later in the day and made her request. Newsom said Campbell could not have days off "for anything." Campbell had at least 1 week's vacation accrued at this point. Campbell then called the surgeon and rescheduled the surgery for August 16 and 17. Campbell returned to work on Friday, August 10. She testified, "I tried to talk to Teresa about it again, Ms. Newsom. And she said that I couldn't have it off." Campbell then asked if she could have the time off for her Independence Day Holiday that she had worked but had not had time off. In addition, she offered to come in to work on her next day off, Monday, August 13. Newsom made no reply that Campbell took as an indication of approval. Instead, Newsom said that Campbell had to find another employee to work in her place. Campbell testified that she asked everyone on the day shift to trade with her, but no one could take her place.

On Monday, August 13, Campbell went to work on her day off, expecting that she could be off for her son's surgery. Campbell also checked with the surgeon's office and was told that her son's surgery could not be put off because insurance approval was running out. That morning, Campbell went to Newsom's office to talk about the surgery, Campbell again explained her problem, only to be told by Newsom. "I told you you couldn't have a day off for no reason." Campbell replied, "Do I have to quit to be able

to help my son have surgery?" At that point, Newsom accused Campbell of threatening her , and took Campbell to see Carter. She was not in so they went to see Coleman.

Campbell recalled that Newsom "talked to me real mean. She said I was lying about the approval of the insurance company." Campbell tried to explain her side of the story, "But Teresa Newsom kept on interrupting, and Shirley said, 'Phyllis, when's your next day off?" Campbell said that today was her day off, but she had come in to work in order to be off later in the week for her son's surgery. At that point, Newsom accused Campbell of "making your own schedule . . . ." Newsom left the room to find the work schedule and Campbell began crying. Campbell left the room and went to the cafeteria. She was called back to the nurses office by Coleman. Once inside the office, Carter asked what was going on and Campbell explained the problem. She asked Carter if she had to quit for her son to have surgery. At that point Carter left the office and returned with a resignation form and instructed Campbell to sign it and put the reason for signing it. Campbell did sign the resignation.

I have carefully considered the testimony of the witnesses testifying about the events surrounding the resignation of Campbell and believe that the testimony of Respondent's witnesses Newsom and Coleman is more consistent, and more credible than that give by Campbell. Respondent on brief had pointed out several inconsistencies in Campbell's testimony with which I concur. For example, Campbell attempted to portray Newsom as wholly unwilling to consider any relief from the schedule in order to enable Campbell to be off to attend her son's surgery. On direct examination by the General Counsel, Campbell said a number of times that Newsom told her that she could not be off "for any [or no] reason." Yet, she admitted that on Friday, August 10, Newsom told her she could be off if she could "get somebody to work in my place," and volunteered that Newsom "could be on the evening shift or nights."

If, as Campbell attempts to establish, Newsom remained unwilling to even consider her request for a deviation from the schedule as late as Monday, August 13, when she purportedly told Campbell, "I told you you couldn't have a day off for no reason," her admission concerning Newsom's prior advice about shift-trading belies any such inference. Further underscoring this point was Campbell's failure to reveal, until cross-examination, that Newsom, in fact acceded to her request to reschedule Thursday, August 16, as a vacation day when Campbell informed her of the doctor's willingness to perform the surgery on August 16 and 17. In her direct examination, by contrast, Campbell said only that when, on the morning of August 10, she informed Newsom of the rescheduling, Newsom made the statements that Campbell "couldn't have it off," and, inconsistently, that Campbell "had to get somebody to work in [her] place."

By allowing the rescheduling of 1 of the 2 days Campbell sought to be off, and authorizing a trade of shifts to accommodate the second of those requested days, the Hospital, in my opinion, made a reasonable attempt to accommodate its staffing needs and Campbell's need to be off. As of the day she resigned, August 13, Campbell had several options open to her aside from resigning. She could have continued to seek someone with whom she could trade days, having not explored the possibility of trading with someone on another shift. She could have awaited further word from Newsom who had just advised her that she was going to recheck the schedule. She could have contacted her son's doctor and/or her insurance carrier to ascertain the options she had with her insurance carrier to ascertain the options she had with them to reschedule the surgery. She could have called in on Friday, August 17, and suffered, at worst, an unexcused absence and whatever arose therefrom, as she had done a month or so earlier in connection with a problem with her car. Though she testified that she thought she might be fired when asked why she did not use this last option, I cannot see how that fear is justified in light of her previous experience calling in that summer. Even if she were correct, the outcome would be the same as quitting.

I also have trouble finding that Respondent had knowledge of her union support. Campbell's name was not on list of employee organizers and did not testify about any overt union activity that would have come to the attention of Respondent. Unlike Webb, Hall, and Gray, whose union support was either readily observable or was admitted to Respondent's management. Campbell did not make herself visible as a union supporter. I think it is reaching to make the assumption that since Campbell went on strike in 1971 that she was in support of the Union in 1991. In any event, I do not believe union animus played a part in Respondent's treatment of Campbell in her request for days off. It was not convincingly demonstrated that the involved department of the Hospital acted differently toward Campbell than other employees, and contrary to Campbell's testimony, I find that the Hospital was still affording Campbell ways to satisfy the need to be off at the time she resigned. I therefore find that Campbell voluntarily quit her employment and was not constructively discharged as alleged in the complaint. To date, she has not requested reemployment with the Hospital.

H. *Did Respondent Unlawfully Engage in Surveillance of Employees by Use of Employee Support Teams?*

This section discusses complaint paragraph 5(f). in or about September 20, Respondent instituted what it calls Employee Support Teams (teams), and what some employees call the "Rat Patrol." The terms were group of management personnel from all departments who purportedly were supposed to roam the Hospital's floors and be of assistance to the shift coordinators in case they needed help. This makes little sense because many of the team members had no professional training to assist in the areas they roamed. For example, how team members such as the Hospital's chaplain and its maintenance director could assist the nursing department shift coordinators is speculative at best. Yet they were on the team assigned to the nursing department. Deskins admitted they could not assist in patient care duties.

Given the timing of the formation of the teams, and their disbandment after the end of the organizing campaign, I believe their sole function was to surveil the employees and to stifle any worktime union discussions and activity. Indeed, team member and Pharmacy Manager Bob Reeser virtually admitted this was the purpose of the teams, In response to a question concerning the last time he worked as a team member, he answered, "I am not even sure exactly if it went into 1991 on the surveillances or not."

Though Respondent might argue that this was just an unfortunate choice of words, the evidence strongly supports this candid description of the mission of the support teams. Rapunzel Hall testified that Reeser, her department manager, told her that he had been assigned to the team because of her union activities. Though Reeser testified that he could not recall making such a statement, I credit the testimony of Hall. She was a very credible witness and her testimony rings true, especially in light of Reeser's admission noted above.

Other employees described their encounters with the team. Lisa Smith, RN, testified, "They'd [team members] just sit around or stand at the nurses' station and they'd talk to us, that sort of thing. Linda Gunnels, LPN, remembers the members coming around to her floor, "Some of them would talk, some of them wouldn't." She also recalled that Myra Checko from the personnel relations office "would sit down and tell ghost stories." Jeffrey Williamson, RN, testified that the team members, "Mainly they just walked around and observed things." Bruce White, a painter in the maintenance department, testified that one night he was working late in the nurses lounge when Supervisor Hiram Little from the admissions office stopped by. Accordingly to White, Little was on team duty. Little told White that he did not know what his team duties were, but that he had been told to "ask people if they need help." Little, half jokingly, asked White if he needed help. White replied, "Not unless you want to help be hang wallpaper." Little laughed and walked on.

Most of the employee witnesses in this proceeding called the teams the rat patrol, and viewed the team members as monitoring their activities or spying on them. I find such surveillance to be coercive, having as its purpose the chilling of union support. This is especially true when one considers that at the same time the rat patrol began operating, Respondent's supervisors began enforcing the no-solicitation policy of the Hospital by removing union literature from bulletin boards, and began informing employees not to talk about the Union at work. Under the circumstances, I find Respondent's rat patrol to constitute unlawful surveillance in violation of Section 8(a)(1) of the Act. Baddour, Inc., 281 NLRB 546 (1986); Atlantic Forest Products, 282 NLRB 855 91987); and New Process Co., 290 NLRB 704 (1988).

I. *Did Respondent Unlawfully Restrict the Distribution of Union Literature in its Parking Area?*

This section discusses complaint paragraphs 5(p) and (Q). It is possible that the evidence supporting these allegations also supported complaint paragraphs 5(j). I cannot find in the record, however, evidence clearly relating to the allegations of paragraph 5(j) and feel compelled to dismiss it for that reason.

With respect to paragraphs 5(p) and (q), the evidence shows that on several occasions during the campaign, groups of employees gathered together before the start of their shifts to distribute union literature to those employees who were changing shifts. Each time, the groups of union supporters would stand outside the hospital near the employees' entrances, and each time, they were ordered off Respondent's property by the hospital security guards.

Alpha Carroll, the fourth floor ward clerk, recalled their one time in September 1990 she was with other employees in the back parking lot one morning when the security guards told them to leave. On another occasion in October, a group of employs went out early in the morning to pass out union literature outside the front of the hospital

when two security guards came out and told the employees that they could not pass out their union literature on hospital property, that they would have to go out to the highway. Barbara Coleman recalled that one morning, she was with a group of 15 to 20 employees at the entrance to the Hospital to pass out union literature before shift change. Coleman testified that while she and the other employees were outside passing out the literature, two security guards told them they could not pass out literature there. At that time Coleman was standing about 10 feed from the main highway near the entrance to the Hospital. Additionally, the guards asked for the names of the employees passing out literature.

Ruth Thacker, an employer in medical records, testified that she was with other employees on the morning of October 15, near the front door of the Hospital, when Housekeeping Supervisor Ron White came out with two security guards and told the employees that they would have to move to the public highway to pass out their union literature. Thacker testified that they did as ordered, but once on the edge of the highway, a security guard asked her for her name. The security guards remained near the union supporters for 15 minutes. Apparently because Thacker had refused to divulge her name to the security guard. White followed her into the medical records office once she began work that morning. Thacker testified that he then asked her for her name. Again, she refused to give it and instead pointed to another supervisor, and suggested to White that he ask her what her name was.

Respondent offered no explanation for its actions in this regard, only attempting to show during cross-examination of employee participants in the actions that some of the handbillers might have been blocking the ingress and egress of other employees, patients, or visitors. I cannot find that Respondent established that the handbillers were actually blocking any entrance for this cross-examination. Moreover, no explanation was offered for the guards telling the handbiller to leave rather than simply move a few

feet away from an entrance, if in fact the handbillers were blocking such entrance. There was likewise no explanation for asking for the names of the handbillers. Having totally failed to offer any legitimate reason for requiring the handbillers to leave the property or for asking their names, I find that Respondent had violated Section 8(a)(1) of the Act by both actions, as alleged in complaint paragraphs 5(p) and (q). See Mini Togs, 304 NLRB 644 (1971); NTA Graphics, 303 NLRB 801 (1991); St. Luke's Hospital, 300 NLRB 836 (199); Southern Maryland Hospital Center, 293 NLRB 1209 (1989); Baddour, Inc., 281 NLRB 546 (1986).

J. Did Respondent's Supervisor Linda Saylors, Lois Jones, and Barbara Ratliff Discriminatorily Restrict Employees Talking About the Union and Distributing Union Literature?

This section discusses complaint paragraphs 5(g), (n)(i), and (o). Linda Gunnels, an employee of the Hospital during 1990, testified that on October 12, she, employees Ivan hackney and Shirley Golf, and Supervisor Linda Saylor were together in the hospital cafeteria. Gunnels asked Saylor "if and where are we allowed to talk union at the Hospital?" According to Gunnells, Saylor responded, ". . . we could not talk it-talk union in any patient care areas. That it would have to be on our break in the coffee shop or the cafeteria." Gunnels then asked Saylor if employees were allowed to bring union literature into the Hospital. Saylor said, ". . . what we brought into the Hospital in our pockets or in our pocketbooks was our own private stuff. But if we were going to hand out union literature, it had to be on our breaks or lunch and it had to be in the coffee shop or the cafeteria."

Saylor then left the group, returning in about 5 minutes. According to Gunnell's, "She said that she had went to check to see if she had told me right about the union literature and talking the union. And she told me that we were not allowed to talk the union in any patient care areas which would involve the patient's room, treatment

rooms, operating rooms, the hallways or corridors adjacent to patient care areas or the solarium or nurses lounge." Gunnels testified that patients came into the nurses lounge to get coffee, though not on a regular basis. The nurses lounge is a working area where employees get the reports given by changing shifts, and where employees get the reports given by changing shifts, and where the employees can smoke.

Gunnells also testified that beginning in about July, employees were told to cease soliciting on working time in defined areas of the Hospital. She did so, but on one occasion thereafter she observed an employee in a patient care area selling bows to another employee. There was no showing that this incident was observed by a supervisor.

I can find nothing unlawful in Saylor's conversation with Gunnells, when the conversation is taken in its entirety.

In August, Supervisor Lois Jones called a meeting of the employees on her floor. The meeting was held in the small room behind the nurses station. There, Jones announced that there was now a new policy in effect, that the employes "could not talk about the Union in the patient areas, in the hallways, stairways, anywhere a patient might be." Barbara Coleman, a nurses aide who attended this meeting, testified that she asked Jones if the no-union discussion prohibition included the nurses lounge, Jones replied, "yes, that included the nurses lounge." Coleman testified that she had never seen patients in the nurses lounge. On the other hand, Gunnels did testify that patients came into the nurses lounge for coffee and that it was used for work, in that it was the place the nurses gave reports to one another as shifts changed. As with the Saylor/Gunnell's conversation, I do not find Jones statements unlawful.

Geraldine Coleman testified that on October 10, she asked Supervisor Barbara Ratliff if she and Ruth Thacker were allowed to talk about the Union in the office. Ratliff said no. Coleman then testified that Ratliff said they could

only talk about it at break and at lunch. Coleman testified that employees in her department would occasionally sell Avon products or Girl Scout cookies during worktime, admitting, however that they were told not to solicit during worktime. Although there is no showing that Ratliff enforced the no-solicitation rule she had announced to employees with respect to the selling of items at work, there is likewise no showing that she ever stopped employees from talking about the Union during worktime. She did not tell Coleman to cease talking about the Union, she was asked the Respondent's policy and was given the official policy, which related to all solicitations. I do not think her answer to the question under the circumstances violates the Act.

K. *Did Respondent's Supervisor Judy Steffey Unlawfully Interrogate and Threaten Lisa Smith About Her Union Activities and Promise a Promotion if Smith Abandoned Her Union Activities?*

This section discusses complaint paragraph 5(i). Lisa Smith was a ward clerk for the Hospital in August 1990. In September, she became an RN. She signed a union authorization card in August. She testified that on September 12, she had a conversation with Director of Nursing Education Judy Steffey. According to Smith, Steffey commented what a good job Tummons was doing and that if we gave him time, he would make a change in things. She continued that if the Union came in and Tummons had to play hardball, that he could do that. She then told Smith that she wasn't a ward clerk anymore, that she was an RN and should act and talk like an RN. Steffey said that Smith was presently a staff nurse and that if she joined the Union, all she would ever be is a staff nurse. On the other hand she said, if you don't join the Union, you can be a shift coordinator or a unit manager. Accordingly to Smith, at this point Steffey began crying and asked Smith what she thought about the Union and what she had just said. Smith answered her stating that she was on company time and can't tell what she thinks about either. She invited Steffey to call her at home and discuss it.

Steffey recalled the conversation began with Steffey congratulating Smith on becoming an RN. According to Steffey she told Smith that she was going to find her role as a ward clerk and being an RN was going to be completely different. The responsibilities would increase and that she would have opportunities for advancement. As a ward clerk there is no possibility for advancement. She testified that she avoided the union campaign entirely because she knew that Smith was a union supporter through rumors. She denied mentioning Tummons, promising or for that matter, crying.

Both of these witnesses seemed credible. I will credit, however Steffey's version of the conversation over Smith's. I cannot see why Steffey' would have to ask Smith what she thought about the Union when Smith was one of the Union's employee organizers.

It is difficult for me to believe Steffey, who is obviously Smith's friend, and one who had gone out of her way to become an RN, would threaten her. Having credited Steffey,s version of the conversation, I will recommend that this complaint allegation be dismissed.

L. *Did Respondent Unlawfully Order Nurse Jeff Williams To Leave the Hospital When He Was Off Duty?*

This discussion relates to Complaint paragraph 5(h). Nurse Jeff Williams testified that he knew of no policy of the Hospital about employee visiting the Hospital when they were off duty. He testified that he was informed he could not do so after the campaign began. He recounted an incident in the fall of 1990, when he was at the hospital, off duty, at about 2 or 3 am. He testified he was in the cafeteria having coffee talking with some friends. He went to the front lobby to get a soft drink and was observed by Supervisor Patty Akers. She asked what was he doing there. He had learned in the cafeteria that another nurse's mother was in the emergency room' so for lack of a better reason , he told Akers he was there to visit her. He got his soda, returned to the cafeteria, finished his visit with his friends,

and swung through the emergency room. Akers was there and told him that the nurse's mother had left. He then went back out the employee entrance of the emergency room and was going down the hall when security told him Akers had asked him to leave. He asked why and was told it was because he was out of uniform, off duty, and had business there.

Akers testified that she saw Williams in the Hospital's main lobby at about 4 am, one morning in the fall of 1990. She testified that she asked him, "Jeff you are not on duty, are you?" Williams said, "NO." She asked why he was there, and he said he was visiting a friend, coworker Ivan Hackney's mother. Akers testified that she knew that Hackney's mother had been in the emergency room the evening before. She went to see if the woman was in the Hospital, and found out that she had been discharged at 11:30 p.m. the previous evening. She was in the emergency room verifying this information when Williams came in the emergency room. Akers said, "Jeff, Ivan's mother is not even a patient in the hospital. You need to go home.'

I find that ordering Williams to leave the Hospital violates the Act. The Hospital did not show that it had a rule, generally disseminated to the employees, restricting the right of employees returning to the Hospital on their off-duty time. The Board has established guidelines for such a rule to protect the right of off-duty employees to express their interest in unions to employees on other shifts. I can understand Akers having an interest in keeping off-duty employees out of work areas so that they do not interfere with the duties of on duty employees. But that reason would not apply to the lobby of the Hospital or the cafeteria. Having no valid rule in effect restricting the right of off-duty employees to come on the Hospital premises, and having no legitimate reason for restricting Williamson's access to the public nonpatient care areas of the Hospital. I find that Respondent violated Section 8(a)(1) of the Act when Akers required him to leave. See *Tri-County Medical Center,* 222 NLRB 1089 (1976); *Southern Maryland Hospi-*

tal Center, 293 NLRB 1209 (1989); and *New Jersey Bell Telephone Co.*, 308 NLRB 277 (1992).

M. *Did Respondent Unlawfully Render Assistance and Support In The Circulation and Mailing of an Antiunion Petition?*

This section discusses complaint paragraph which alleges that on September 14, Respondent, acting through Maudie May, Carolyn Johnson, Sally Stamper, Debra Battisello, Jean Shakey, Betty Martin, and Nina Renyold, and by paying the cost of mailing, assisted, supported, and approved of the circulation among its employees of a petition to dissuade the Union from seeking to represent its employees.

What purports to be the petition in question is General Counsel's Exhibit 27, which in printed part reads;

> Dear Anne Kempski,
>
> We the employees of Pikeville Methodist Hospital want to thank you for your time put forth in forming a Union. However there are some employees who have a different view than you. There have been a lot of changes within the last few months within the hospital. We, the employees, feel that these changes have been beneficial to us. We are very pleased with the progress that Pikeville Methodist Hospital has made. We believe that a Union in this hospital is not needed! To some, your time has been greatly appreciated. But to others, we believe that now is the time to leave things as they are and as they are progressing. We believe that enough time has been spent on the Union issue, and we do not want to be Union duespayers.

The petition was signed by about 40 employees, including those persons named in the involved allegation who are supervisory personnel. Judy Webb testified that on September 14, she observed employee Joyce Morris, thought by Webb to be a hospital courier, go into the lab and pass a paper to the technicians working there. The technicians read the paper and sign it. Being curious, Webb followed her as Morris went into another part of the lab. She passed a technician whom asked what was Morris was showing

them. This technician told her it was a petition to Anne Kempski telling the Union to "get on with it or get out." Following Morris, she saw three supervisors sign the paper. These were Mary Jo Blacksbum, Carolyn Johnson and Deb Battistello. On cross-examination, Webb testified that she saw General Counsel's Exhibit 27 at the union office and made an "educated guess" that it was the paper Morris was circulating. The General Counsel has the burden of proving the complaint allegations and with respect to this one, he has not done so. There is no proof that General Counsel's Exhibit was the paper being circulated by Morris. There is likewise no proof that Respondent supported, assisted, or approved of the circulation of the General Counsel's Exhibit 27, or for its mailing. I recommend dismissal of this allegation..

Conclusions of Law

1. The Respondent, Pikeville United Methodist Hospital of Kentucky, Inc. nee The Methodist Hospital of Kentucky, Inc. is an employer engaged in commerce within the meaning of section 2(2) and (6) of the act and is a health care institution within the meaning of section 2(14) of the Act.

2. The Union, United Steelworkers of America, AFL-CLO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in and is engaging in conduct in violation of Section 8(a)(!) of the Act, by;

(a) Acting through its agent, Lloyd Price, in August 1990, soliciting grievances from employees and promising to rectify those grievances, and taking an employee opinion survey, all with the intent to discourage employees' support of and activities on be half of the Union.

(b) Acting through its supervisor, Cheryl Hickman, in September and October 1990, coercively interrogating employees about their union activities and sympathies, threatening employees with unspecified trouble if they signed a union authorization card, and prohibiting employees from

discussing the Union, all to discourage employees support of and activities on behalf of the Union.

(c) Creating and utilizing so-called employee support teams in the fall of 1990 for the purpose of surveilling its employees to discourage employees support of and activities on behalf of the Union.

(d) Discriminatorily enforcing its rules regarding posting of material on bulletin boards by allowing the posting material of nonwork related material while prohibiting the posting of union literature, to discourage employees support of and activities on behalf of the Union.

(e) Acting through Supervisor Patty Akers, in September, 1990, discriminatorliy denying access to the Hospital to an off-duty employee, to discourage employees support of and activities on behalf of the Union.

(f) Acting through Supervisor Ron White, in October 1990, impliedly threatening an employee who had been distributing union literature by asking her to identify herself and asking the location of her supervisor, creating the impression that her union activities were under surveillance, to discourage employees support of activities on behalf of the Union.

(g) Acting through its agents and security guards, in October 1990, telling its employees that they could not distribute union literature in its parking lots and ordering them to leave, to discourage employees support of and activities on behalf of the Union.

(h) Acting through Supervisor Bob Ratliff, in October 1990, orally promulgating a rule prohibiting employees from talking about the Union while eating lunch in the Respondent's paint shop and threatening to prohibit employees from eating lunch in the paint shop, to discourage employees support of and activities on behalf of the Union.

4. Respondent has engaged in and is engaging in conduct in violation of Section 8(a)(1) and (3) of the Act, by;

(a) Acting through Supervisor Phyllis Bowling in October 1990, impliedly threatening an employee with loss of

her job unless she became antiunion, to discourage employees support of and activities on behalf of the Union.

(b) Giving its employee Judy Webb an unsatisfactory employee evaluation in September 1990, to discourage employees support of and activities on behalf on behalf of the Union.

(c) Giving its employee Rapunzel Hall, in November 1990, a written warning and changing her job duties, to discourage employees support of and activities on behalf of the Union.

(d) In November 1990, suspending and then discharging its employee Robin Gray, to discourage employees support of and activities on behalf of the Union.

5. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent did not commit the other unfair labor practices alleged in the complaint.

The Remedy

Having found that respondent has engaged in conduct in violation Section 8(a)(1) and (3) of the Act. I recommend that it be ordered to cease and desist therefrom and take the following affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully suspended on November 8, 1990, and thereafter discharge its employee Robin Gray. I recommend that it be ordered to offer her immediate reinstatement to her former position or to a substantially equivalent position, discharging if necessary anyone hired to replace her, and make her whole for any loss in wages or benefits she may have suffered by reason

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[11]My finding that Respondent discriminatorily and unlawfully enforced its rules regard posting of literature is a general one and is based on my findings that Respondent did in fact commit the acts alleged in complaint pars. 5(a)(i), (g), (n)(u), and (r)(ii).

of Respondents discriminatory actions toward her. Back pay shall be computed with the Board's policy as set forth *F.W. Woolworth Co., 90* (1950), with interest computed as set forth in *New Horizons for the Respondent*, 283 NLRB 1173 (1987).

Having found that Respondent unlawfully gave its employee Judy Webb an unsatisfactory evaluation on September 9, 1990, and gave its employee Rapunzel Hall a written warning and changed her job duties on November 1, 1990, it is recommended that the evaluation given to Webb and the warning given to Hall be rescinded by Respondent. Any reference to the suspension and discharge of Gray, the unsatisfactory evaluation of Webb and the written warning given to Hall should be explunged from their personnel records and these employees be given written notice of such removal and assured in writing that these unlawful suspensions, discharges, evaluations, and warnings will not be used as a basis for future personnel actions concerning them.

It is further recommended that Respondent be ordered, upon request by Rapunzel Hall, to restore her job duties taken away from her on November 1, 1990.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Pikeville United Methodist Hospital of Kentucky, Inc., Pikeville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting grievances from employees and promising to rectify those grievances, and taking an employee opin-

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[12]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ion survey, all with the intent to intent to discourage employees support of and activities on behalf of the Union.

(b) Coercively interrogating employees about their union activities and sympathies, threatening employees with unspecified trouble if they signed a union authorization card, and prohibiting employees from discussing the Union, all to discourage employees support of and activities on behalf of the Union.

(c) Creating and utilizing so-called Employee Support Teams for the purpose of surveilling its employees to discourage employees support of and activities on activities on behalf of the Union.

(d) Discriminatorily enforcing its rules regarding posting of material on bulletin boards by allowing the posting of non work related material while prohibiting the posting of union literature, to discourage employees support of and activities on behalf of the Union.

(e) Discriminatorily denying access to the Hospital to an off-duty employee, to discourage employees support of and activities on behalf of the Union.

(f) Impliedly threatening an employee who had been distributing union literature by asking her to identify herself and asking the location of her supervisor, creating the impression that her union activities were under surveillance, to discourage employees support of and behalf on the Union.

(g) Telling its employees that they cannot distribute union literature in its parking lots and ordering them to leave, to discourage employees support of and the activities on behalf of the Union.

(h) Orally promulgating a rule prohibiting employees from talking about the Union while eating in the Respondent's paint shop and threatening to prohibit employees from eating lunch in the paint shop, to discourage employees support of and activities on behalf of the Union.

(i) Impliedly threatening an employee with loss of her job unless she become antiunion, to discourage employees support of activities on behalf of the Union.

(j) Giving its employees unsatisfactory employee evaluations, to discourage employees support of and activities on behalf of the Union.

(k) Giving its employees, written warnings and changing their job duties, to discourage employees support of and activities on behalf of the Union.

(l) Suspending and discharging its employees, to discourage employees support of and activities on behalf of the Union.

(m) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

(a) Offer full and immediate reinstatement to Robin Gray to her former or substantially equivalent position, discouraging, if necessary, any employee hired to replace her, and make her whole for any loss of wages or benefits she may have suffered by her unlawful suspension and discharge, with interest, in the manner set forth in the remedy section of this decision.

(b) Rescind the unsatisfactory employee evaluation given to Judy Webb on September 9, and the written warning given to Rapunzel Hall on November 1, 1990, and on her request, restore Rapunzel Hall's job duties taken away from her on November 1, 1990.

(c) Expunge from its personnel records all references to Robin Gray's suspension and discharge, Judy Webb's September 9, 1990 employee evaluation, and Rapunzel Hall's November 1, 1990, written warning, and give Robin Gray, Judy Webb, and Rapunzel Hall written notice that this has been done and assure them in writing that these unlawful actions will not be used as a basis for future personnel actions concerning them.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying all payroll records, social security payments records, timecards,

personnel records necessary or useful in complying with the terms of this Order.

(f) Post at its facility in Pikeville, Kentucky, copies of the attached notice marked "Appendix"[13] Copies of the notice, on forms provided by the Regional Director for the Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, disfaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order, what steps the Respondent has taken to comply.

Dated, Washington, D.C. July 8 1994

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[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a judgment of the United State Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

Notice To Employees

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

In recognition of these rights, we hereby notify our employees:

We will NOT solicit grievances from employees and promise to rectify those grievances, and take an employee opinion survey, with the intent of discouraging employees' support of and activities on behalf of the Union.

We will NOT coercively interrogate our employees about their union activities and sympathies, threaten our employees with unspecified trouble if they sign a union authorization card, and prohibit our employees from discussing the Union, to discourage our employees' support of and activities on behalf of the Union.

We will NOT create and utilize so-called Employee Support Teams for the purpose of surveilling our employees to discourage our employees' support of and activities on behalf of the Union.

We will NOT discriminatory enforce our rules regarding posting of material on bulletin boards by allowing the posting of nonwork related material while prohibiting the

posting of union literature, to discourage employees' support of and activities on behalf of the Union.

We will NOT discriminatorily deny access to the Hospital to an off-duty employee, to discourage employees' support of and activities on behalf of the Union.

We will NOT impliedly threaten our employees who are distributing union literate by asking them to identify themselves and asking the location of their supervisors, creating the impression that their union activities are under surveillance, to discourage employees' support of and activities on behalf of the union.

We will NOT telling our employees that they cannot distribute union literature in our parking lots and order them to leave, to discourage employees' support of and activities on behalf of the Union.

We will NOT orally promulgate a rule prohibiting employees from talking about the Union while eating lunch in the Respondent's paint shop and threaten to prohibit employees from eating lunch in the paint shop, to discourage employees' support of and activities on behalf of the Union.

We will NOT impliedly threaten our employees with loss of their jobs unless they became antiunion, to discourage employees' support of and activities on behalf of the Union.

We will NOT give our employees unsatisfactory employee evaluations, to discourage employees' support of and activities on behalf of the Union.

We will NOT give our employees written warnings or change their job duties, to discourage employees' support of and activities on behalf of the Union.

We will NOT suspend or discharge our employees, to discourage employees' support of and activities on behalf of the Union.

We will NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

We will offer full and immediate reinstatement to Robin Gray to her former or substantially equivalent position, discharging, if necessary, any employee hired to replace her, and make her whole for any loss of wages or benefits she may have suffered by her unlawful suspension and discharge, with interest.

We will rescind the unsatisfactory employee evaluation given to Judy Webb on September 9, 1990, and the written warning given to Rapunzel Hall on November 1, 1990, and upon her request, restore Rapunzel Hall's job duties taken away from her on November 1, 1990.

We will expunge from our personnel records all references to Robin Gray's suspension and discharge, Judy Webb's September 9, 1990 employee evaluation, and rapunzel Hall's November 1, 1990 written warning, and give Robin Gray, Judy Webb, and Rapunzel Hall written notice that this has been done and assure them in writing that these unlawful actions will not be used as a basis for future personnel actions concerning them.

RECOMMENDED FOR FULL-TEXT PUBLICATION
PURSUANT TO SIXTH CIRCUIT RULE 24
ELECTRONIC CITATION: 1997 FED APP. 0109P (6TH CIR.)
FILE NAME: 97A0109P.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 95-6467/6644

PIKEVILLE UNITED METHODIST HOSPITAL OF KENTUCKY, INC., - *Petitioner/Cross-Respondent,*

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, - - - - *Intervenor,*

NATIONAL LABOR RELATIONS BOARD, - - - - *Respondent/Cross-Petitioner.*

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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ORDER—Decided and Filed April 1, 1997

Before: NELSON and DAUGHTREY, Circuit Judges; COHN, District Judge.*

MARTHA CRAIG DAUGHTREY, Circuit Judge. Before us is a petition for review filed by the Pikeville United Methodist Hospital of Kentucky, Inc., and a crossapplication filed by the National Labor Relations Board seeking enforcement of a Board order remedying various unfair labor practices found to have been committed by the hospital.

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*The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

In its petition, the hospital contends that it is an exempt employer under 29 U.S.C. § 152(2) and that the NLRB thus had no authority to review the unfair labor practice claims made against it. Pikeville United Methodist Hospital also insists that substantial evidence was not presented to the NLRB to justify the Board's findings regarding those alleged labor law violations. Because we conclude that the Board did have jurisdiction over the disputed claims and that substantial evidence in the record supported most, but not all, of the Board's findings, we hold that the Board's order must be enforced in part and set aside in part.

I. PROCEDURAL AND FACTUAL BACKGROUND

A. Early Relationship Between City Of Pikeville And The Hospital

Pikeville United Methodist Hospital was originally incorporated in 1923 as the Methodist Hospital of Kentucky. Over the years, the hospital outgrew its facilities and required more modern premises to provide appropriate medical care to the public it served. Consequently, in the mid-1960's, Pikeville United Methodist Hospital purchased additional property on which its newer hospital now stands. The financing for the new facility was obtained in cooperation with the City of Pikeville, which created a holding company known as the Pikeville, Kentucky Public Hospital Corporation to issue bonds covering the costs of construction.

In consideration of the City's role in the provision of funds for building the new hospital, Pikeville United Methodist Hospital conveyed its ownership interest in the property to the City of Pikeville in fee simple. The City then re-conveyed the interest to the holding company, which leased the property back to the City. Finally, to complete the circle, the City of Pikeville sublet the hospital land and buildings to Pikeville United Methodist Hospital.[1] The

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[1] This convoluted "holding company bond issue" procedure was utilized to avoid the strictures of Section 157 of the Constitution of Kentucky which places severe limitations on the incurrence of indebtedness by any "county, city, town, taxing district, or other municipality."

City retained, however, the right to terminate the sublease to Pikeville United Methodist Hospital and the lease with the holding company upon 90 days' advance notice. Having created the holding company, the city also retained the power to approve and replace the directors of that entity. Other provisions of the sublease between the City and Pikeville United Methodist Hospital called for management of the hospital pursuant to the "directions of the City," deposit of all funds and revenues from the operation of the hospital into a revenue fund account of the city, and charging such rates for services and facilities as are specified in the annual budget adopted by the City."

Despite the lease provisions calling for active municipal oversight and control of the Pikeville United Methodist Hospital operations, the actual practices under the sublease did not result in such a heightened level of involvement on the part of the City. In fact, as noted by an acting regional director of the NLRB in an earlier administrative proceeding involving Pikeville United Methodist Hospital:

> The record discloses that the Employer submitted a proposed annual budget to the City for approval in accordance with the sublease requirements on one occasion in 1971, the year in which the leases were executed. Despite provisions requiring such actions, there have been no audits of hospital costs or City approval of rates for patient services. Prior to 1991 there is no evidence that the City was directly involved in the daily administration, operation or management of the hospital facility or influenced the Employer's labor relations.

Although the City did appoint the members of the board of the holding company, many of whom also served on the board of directors of Pikeville United Methodist Hospital[2], other evidence also indicated that the City had no signifi-

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[2]In fact, until sometime in 1990, all members of the holding company's board of directors were also members of the much larger board of directors of Pikeville United Methodist Hospital.

cant connection with the day-to-day activities of the hospital. Dr. John Tummons, who was appointed administrator of Pikeville United Methodist Hospital in late 1989, stated, for example, that he, not city officials, was responsible for the hospital's labor relations. He further elaborated by explaining that he had "final authority" regarding the establishment of wage rates for the hospital, the creation of new jobs at the facility, the content of those jobs, and "[a]ny changes in pay scales or the overall compensation system."

B. Labor Strife And Subsequent City-Hospital Relations

During the summer of 1990, the United Steelworkers of America began a drive to organize the non-professional employees of Pikeville United Methodist Hospital. Because of certain actions taken by the hospital during the campaign, however, the union filed a series of unfair labor practice charges between September 20, 1990, and November 19, 1990. The acting regional director of the NLRB, after reviewing the charges, issued a "Complaint and Notice of Hearing" echoing many of those allegations. In responding to the complaint, the hospital chose not to challenge the Board's jurisdiction to resolve the dispute.

Shortly thereafter, the NLRB began a hearing on unit determination issues involving this same labor dispute but docketed with a separate case number. Before the unit determination case could be completed, the NLRB ordered all of the previous unfair labor practice charges against Pikeville United Methodist Hospital consolidated and issued a new, amended complaint incorporating the earlier charges made against the hospital. When answering the new, amended complaint, the hospital, for the first time, claimed as a defense to the charges that the NLRB had no jurisdiction over it because Pikeville United Methodist Hospital did not "retain sufficient control over the employment relationship to engage in meaningful collective bargaining."

In an effort to document the claim that the City controlled the hospital's employment practices, and thus de-

prive the NLRB of jurisdiction, the Pikeville City Commission passed a resolution on January 14, 1991, that directed:

> [Pikeville United Methodist Hospital] shall not enter into any contract of employment, whether individually extended or collectively bargained, nor shall it modify wage rates, hours of work or any employee benefit, whether pursuant to a written plan or practice, without the express written consent of the City of Pikeville, Kentucky or its designated representative.

The City's efforts were initially crowned with success. In July 1991, the NLRB ruled in the unit determination case that, although Pikeville United Methodist Hospital is an "employer" for purposes of the National Labor Relations Act, the Board would not assert its jurisdiction over the hospital. Relying upon its decision in *Res-Care, Inc.*, 280 NLRB 670 (1986), the NLRB determined that the recently-passed municipal resolution sufficiently deprived the hospital of control over employment conditions so as to foreclose the possibility that the employer could engage in meaningful negotiations with employees. Because no such fruitful bargaining could occur, the Board concluded that holding the hospital responsible for correction of any labor problems would be futile.

On July 8, 1994, however, before addressing the *unfair labor practice* issues before him in the second Pikeville United Methodist Hospital case, an administrative law judge revisited the regional director's earlier jurisdictional ruling made in the unit determination portion of this labor dispute. In doing so, the administrative law judge concluded that the January 14 resolution of the Pikeville City Commission was a "sham transaction" and that the City still did not assert meaningful control or oversight over the hospital's labor relations activities.

The administrative law judge also determined that, regardless of the outcome of an application of the *ResCare, Inc.* analysis, the NLRB could address the unfair labor practices alleged to have occurred prior to passage of the January 14 resolution because "[i]t is clear that the em-

ployees of the Hospital had every right to believe that the Board had jurisdiction over the Respondent at the time of the commission of the unfair labor practices." Furthermore, because prior administrative decisions of the NLRB established that the Board itself is not precluded from reconsidering its own earlier actions, the administrative law judge found that the earlier ruling on the Board's jurisdiction over Pikeville United Methodist Hospital in the unit determination case did not foreclose revisiting that issue in a subsequent proceeding.[3]

Finally, after justifying his exercise of jurisdiction in this matter, the administrative law judge found substantial evidence in the record to support a number of tile unfair labor practice allegations made against the hospital. He therefore ordered Pikeville United Methodist Hospital to cease and desist from engaging in such practices and further ordered that certain affirmative actions be taken to remedy injuries suffered by employees as a result of the hospital's actions.

A panel of the NLRB adopted the recommendations of the administrative law judge and in turn ordered that the injunctive and affirmative relief detailed in the administrative law judge's decision be implemented. In doing so, however, the Board concluded that its recent decision in *Management Training Corp.*, 317 NLRB 1355 (1995), overruled *Res-Care, Inc.* and, thus, rather than relying upon a *Res-Care*, Inc. analysis, focused its inquiry on only two questions: (1) whether the employer meets the definition of an "employer" contained in § 2(2) of the National Labor Relations Act, 29 U.S.C. § 152(2), and (2) whether the employer meets applicable monetary jurisdictional standards. Finding that Pikeville United Methodist Hospital did indeed satisfy those criteria, the NLRB ruled that the

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[3]The administrative law judge also held that passage of the January 14 resolution was preempted by the National Labor Relations Act's prohibition of any restriction of employees' rights to bargain collectively.

Board could properly exercise jurisdiction over the hospital in this matter. Concurring in the findings of the administrative law judge, the NLRB ruled, in the alternative, that the Board's exercise of jurisdiction is proper even under the *Res-Care, Inc.* standard. The Board also held that, in any event, it could exercise jurisdiction here "for the limited purpose of remedying the unfair labor practices, which occurred several months before the Pikeville City Commission attempted, albeit unsuccessfully, to remove the Board's jurisdiction by passing the January 14, 1991 resolution."

II. JURISDICTION

A. Statutory Basis For Jurisdiction

Before this court, Pikeville United Methodist Hospital first contends that the NLRB erred in exercising jurisdiction over a labor dispute involving the hospital. An "employer" subject to regulation by the Board under the National Labor Relations Act is, however, defined to include:

> . . . any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. § 152(2).

Despite the broad reach of the statute, Pikeville United Methodist Hospital argues that this definitional provision necessarily exempts the hospital from the Act's coverage because the lease signed by the hospital and the City vested such total control of the hospital's activities in the City that Pikeville United Methodist Hospital itself became a political subdivision of the State of Kentucky. As held by the Supreme Court, however, a hospital like Pikeville United Methodist Hospital may be *statutorily* exempt from the jurisdiction of the NLRB only if it is either "(1) created

directly by the state, so as to constitute [a] department[] or administrative arm[] of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." *NLRB* v. *Natural Gas Util. Dist, of Hawkins County,* Tenn., 402 U.S. 600, 604-05 (1971).

Pikeville United Methodist Hospital appropriately concedes that it was not "created directly by the state." Rather, it recognizes that it was instead incorporated as a private business entity more than 70 years ago. The germane inquiry in this dispute concerning the statutory exemption of the hospital thus centers around the issue of whether the hospital administrators are, in fact and by necessity, responsible to public officials for their actions. The hospital suggests an affirmative response to such a question by virtue of the fact that the City of Pikeville must appoint the members of the board of directors of *the holding company,* some of whom also happen to sit on the hospital's board. No law or ordinance, however, requires that the board of directors of *Pikeville United Methodist Hospital* be elected by the general populace or requires that those board members be public officials also serving on the board of the holding company. In fact, many individual hospital board members who are responsible for administration of Pikeville United Methodist Hospital have no connection whatsoever with the holding company board of directors or with the Pikeville municipal government. The record in this matter contains absolutely no evidence to support the contention that the City of Pikeville has authority to control the membership of the *hospital's* board of directors. Because it thus possesses neither of the recognized attributes of a statutorily exempt employer, Pikeville United Methodist Hospital may not rely upon that argument to place itself beyond the jurisdictional reach of the NLRB.

B. Discretionary Basis For Jurisdiction

Even though the hospital may not fall neatly within the explicit statutory exemption from Board coverage, Pikeville United Methodist Hospital argues that the control exercised by the City over the hospital's labor relation-

ships should nevertheless lead the Board to exercise its *discretion* to refrain from asserting jurisdiction in this case. It is true that in some instances, the NLRB may, in its own discretion, choose not to exercise the jurisdiction that it may otherwise invoke. It is the NLRB alone, however, that "has discretion whether to exercise jurisdiction." *Crestline Memorial Hosp. Assn, Inc.* v. *NLRB,* 668 F.2d 243, 244 (6th Cir. 1982). Thus, "absent a showing that [the Board] acted unfairly and caused substantial prejudice to the affected employer," a reviewing court should not disturb the NLRB's discretionary decision concerning assertion of that oversight. *Human Development Assn* v. *NLRB,* 937 F.2d 657, 661 (D.C. Cir, 1991) (quoting *NLRB* v. *Parents & Friends of the Specialized Living Center,* 879 F.2d 1442, 1448 (7th Cir. 1989)).

Because it cannot "treat similar situations in dissimilar ways," *Burinskas* v. *NLRB,* 357 F.2d 822, 827 (D.C. Cir. 1966), the NLRB has attempted to develop a coherent policy governing its jurisdictional decisions. In 1986, therefore, the Board ruled that it would decide whether to exercise its jurisdiction over certain private employers who contracted with exempt entities for the provision of services by examining "not only the control over essential terms and conditions of employment retained by the employer, but also the scope and degree of control exercised by the exempt entity over the employer's labor relations, to determine whether the employer in issue is capable of engaging in meaningful collective bargaining." *Res-Care, Inc.,* 280 NLRB at 672. In 1995, however, the Board abandoned the litigation-intensive *Res-Care, Inc.* analysis and, in Management Training Corp., instead decided "to assert jurisdiction whenever an employer technically falls within the statutory definition, regardless of whether an exempt political subdivision actually controls the employment terms." *ARA Services, Inc.* v. *NLRB,* 71 F. 3d 129, 134-35 (4th Cir. 1995).

1. Exercise Of Discretionary Jurisdiction Under Management Training, Inc.

Under a *Management Training Corp.* analysis, the jurisdiction of the NLRB over Pikeville United Methodist Hospital is established simply by the minimal showing that the hospital both "meets the definition of 'employer' under Section 2(2) of the Act," and "meets the applicable monetary jurisdictional standards."[4] 317 NLRB at 1358. In fact, the new discretionary jurisdictional standard is so broad that the hospital does not even attempt to argue before this court that it does not meet the appropriate criteria of the new test. Instead, the hospital attacks the analysis by submitting that the NLRB was without authority to abandon the *Res-Care,* Inc. standard and substitute the new one.

2. Authority Of NLRB To Modify Discretionary Jurisdiction Standard

In making such an argument, the hospital insists that the *Res-Care, Inc.* "control" standard is mandated by § 2(2) of the National Labor Relations Act, 29 U.S.C. § 152(2), and that the *Management Training Corp.* test thus violates that statutory provision. As noted above, however, § 2(2) simply and straightforwardly exempts only certain named governmental units and other organizations from the reach of the NLRB. Nor did the Supreme Court's *NLRB* v. *Natural Gas Util. Dist. of Hawkins County, Tenn.* decision incorporate the idea of the *Res-Care, Inc.* "control" standard into its two-pronged statutory exemption analysis. 402 U.S. at 604-05.

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[4]In limiting its jurisdictional reach to disputes involving entities .engaged incommerce," the NLRB established discretionary monetary jurisdictional amounts for various categories of businesses. To be considered "engaged in commerce," hospitals, for example, must have gross annual revenues of at least $250,000 and interstate commercial transactions of at least $50,000 per year. *See, e.g., Waimea Dispensary, Inc.,* 218 NLRB 1337 (1975).

Instead, as argued by the Board before this court, the "control" test elucidated in *Res-Care, Inc.* is only a tool previously used by the Board to define the parameters of the agency's *discretionary,* as opposed to statutory, jurisdiction. Only after jurisdiction pursuant to § 2(2) was Established would the Board examine the control exercised by the employer over aspects of employment conditions to determine whether the NLRB would nevertheless choose to forego examination of alleged labor law violations.[5]

Moreover, the Board has offered a supportable rationale for its decision to alter the *Res-Care,* Inc. standard. As stated in Management Training Corp., "[i]t was shortsighted . . . for the Board to declare [in *Res-Care,* Inc.] that bargaining is meaningless unless it includes the entire range of economic issues." Management Training Corp., 317 NLRB at 1357. In today's labor market, the economic packages offered to employees are no longer the sole prizes of a bargaining event.

> In times of downsizing, recession, low profits, or when economic growth is uncertain or doubtful, economic gains at the bargaining table are minimal at best. Here the focus of negotiations may be upon such matters as job security, job classifications, employer flexibility in assignments, employee involvement or participation and the like.

Id. We hold that the *Res-Care, Inc.* standard was not statutorily mandated and that the Board did not contravene § 2(2) in applying *Management Training Corp.* to the facts of this case.

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[5]The *Res-Care, Inc.* decision itself, in carefully selected language, repeatedly speaks of the Board's *declination* of the assertion of jurisdiction. *Res-Care,* Inc., 280 NLRB at 670, 674. Had the *Res-Care, Inc.* test been based upon the statutory mandates of § 2(2), the NLRB would not have been in a position to "decline" jurisdiction; rather, the Board would have had no discretion in the matter whatsoever.

The Fourth Circuit has recently adopted an identical position in *Teledyne Econ. Dev.* v. *NLRB*, Nos. 96-1630, 96-1790, 1997 WL 97068, at *3 (4th Cir. Mar. 6, 1997). In Teledyne, the court recognized that adoption of the *ResCare, Inc.* standard was not statutorily mandated, but instead, was merely an exercise of the discretion granted the Board by Congress. Consequently, when the agency decides to reverse its course and "assert its jurisdiction rather than recognizing an exemption not compelled by section 2(2), the Board is within its authority." *Id.* (footnote omitted).

III. UNFAIR LABOR PRACTICES

In considering NLRB decisions concerning unfair labor practices, this court employs the standard of review delineated in 29 U.S.C. § 160(e). Pursuant to that statutory directive, "[t]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." *Id.*

A. Uncontested Findings

During the administrative phase of these proceedings, the administrative law judge and NLRB found that Pikeville United Methodist Hospital committed four unfair labor practices that are not now contested before this court. Specifically, the Board determined that violations of the National Labor Relations Act occurred when employee Judy Webb was given an uncharacteristically poor work evaluation solely because of her union activities, when employee Robin Gray was threatened by her supervisor that she "could be replaced by someone from the street" unless she began expressing anti-union sentiments, when union discussions between employees were forbidden at lunch time, and when the hospital commissioned surveillance teams, or "rat patrols," to roam through the hospital monitoring the employees for any evidence of union sympathizing or labor discussions.

B. Contested Findings

1. Solicitation Of Grievances Through Commissioned Survey

The administrative law judge and NLRB also concluded that Pikeville United Methodist Hospital violated the provisions of 29 U.S.C. § 158(a)(1)[6] by-hiring SESCO, an outside consulting firm, to conduct a survey of employee attitudes and grievances. The hospital insists that solicitation of grievances after commencement of a union organizing campaign is improper only if it is meaningfully different from pre-campaign solicitation and that here, the requests made to employees to list complaints and concerns were no different from the active grievance solicitation previously conducted by John Tummons, the hospital administrator. The hospital further contends that the record contains no evidence to support a conclusion that the SESCO survey post-dates the hospital's knowledge of the employees' organizing activities.

As stated by the administrative law judge, however, the record in this matter conclusively supports the finding that hospital employees informed Tummons on July 30, 1990, of their intention to seek union representation and SESCO did not initiate its survey until early August.[7]. Moreover, Pikeville United Methodist Hospital had not conducted a similar survey since 1982 and one hospital em-

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[6]29 U.S.C. § 158(a)(1) provides that "[ilt shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the fights [to self-organization, collective bargaining, and concerted activity for the purpose of collective bargaining or other mutual aid or protection]."

[7]Although one of five witnesses involved with the presentation of the request for representation to Tummons stated that the request may not have been delivered until mid-August, the administrative law judge explained that the witness was uncertain about that and other relevant dates throughout his testimony. Consequently, the administrative law judge chose to credit the account offered by the other four witnesses on this matter. "[T]he assignment of credibility to witnesses is the prerogative of the Board." *Union Carbide Corp.* v. *NLRB,* 714 F.2d 657, 660 (6th Cir. 1983).

ployee was told by a person distributing the survey that the purpose of the polling was "to see what the problems were so they might could work on them," and that although nothing was done in response to the earlier survey, "Dr. Tummons was going to do something about this survey."

It is undisputed that Dr. Tummons conducted regular discussions with employees to solicit their input on working conditions at Pikeville United Methodist Hospital. Nevertheless, the breadth and scope of the SESCO survey, coming eight years after the most recent similar grievance solicitation and only after hospital administrators learned of the employees' desire to organize was clearly a substantive change in the nature of the hospital's responsiveness to grievances. Furthermore, the timing of that change, coming as it did only a week after communication of the employees' desire for union representation, leads to the natural inference that the increased concern was improperly precipitated by the threat of union activity. This court may not displace reasonable inferences of the Board. *NLRB* V. *Ohio Masonic Home,* 892 F.2d 449, 451 (6th Cir. 1989). Thus, because such a response by the hospital to the organizational efforts is in violation of 29 U.S.C. § 158(a)(1), the Board was justified in finding that the commissioning of the SESCO survey constituted an unfair labor practice. *See Carbonneau Indus., Inc.,* 228 NLRB 597, 598-99 (1977). *See also NLRB* v. *Naum Brov., Inc.,* 637 P.2d 589, 591 (6th Cir. 1981) (per curiam).

2. Discharge Of Employee Robin Gray

The hospital next submits that the record does not support the administrative law judge's and Board's conclusions that Robin Gray was threatened, suspended, and discharged in retaliation for her pro-union stance. Gray was employed as a ward clerk in the special care nursery of Pikeville United Methodist Hospital. Once the organizational campaign began, she signed a union card but was told by her supervisor, Cheryl Hickman, that "the union was trouble and . . . only wanted in to . . . the hospital to

make their wages larger because of the dues that all the employees would have to pay." Hickman also told Gray that "if people signed union cards, it was trouble," and continually asked the employee whether she had retrieved her union card from the union organizer. Approximately a month later, Gray was told by Hickman and by Phyllis Bowling, another supervisor, "not to be discussing anything . . . concerning the union anymore because it was disruptive with other co-workers." Shortly after that, Bowling made a comment to Gray that she "had better be anti-union because [her] job could be replaced by someone from the street."

On November 7, 1990, Gray used approximately 15 minutes of her 30-minute lunch break before receiving permission from Brenda Chapman, one of her immediate supervisors, to retrieve a package of photographs that had been developed at a local store. When Gray returned to work roughly 25 minutes later, she was told to report to a different floor for work at a desk. She admitted that she had neither clocked out of the hospital as she left on her errand nor clocked in as she returned. Furthermore, she claimed that no one commented to her about her time card until the following afternoon when Hickman told Gray that Brenda Chapman had ordered Gray to clock out prior to leaving for her pictures the previous day. Gray responded that she had not heard Chapman make such a request, but would be happy to note her absence from the hospital on her time card. She was informed, however, that "it was too late" and that she would be suspended without pay pending an investigation.

When Gray was finally called to return to the hospital, she was told that she was to be dismissed for insubordination. Before the administrative law judge, she explained that she was surprised by the retributive action because she, as well as other employees, had many times before run brief outside errands without clocking out and without being told they must clock out.

Pikeville United Methodist Hospital offered evidence that it did indeed have a written policy requiring employ-

ees to check out of the facility "[i]f it is necessary for an employee to leave the Hospital before completion of the shift." Additionally, Hickman and Chapman testified that they had granted permission to Gray to leave the hospital to run errands on November 5 and November 7, respectively, on the condition that Gray clock out before leaving. Employee Mitzi Thacker also testified that she overheard Chapman informing Gray that she must clock out prior to running her errand on November 7.

Despite the quantity of the evidence submitted in Opposition to Gray's account of the events of November 5-7, the administrative law judge chose to credit Gray's version of the events. The administrative law judge made a specific finding that, based upon his observation of Gray, he found her a more credible witness than Chapman, Hickman, and Thacker. He also concluded that the discharge of the employee over the time-card flap was further evidence of the hospital's anti-union animus, because the drastic punishment resulted from a monetary loss to the hospital of less than $10, and because no other employee had ever been so disciplined, even though ample evidence was presented that other personnel were also guilty of failing to clock out for midday errands. Such a reasonable inference may not be displaced by a reviewing court. *NLRB* v. *Ohio Masonic Home,* 892 F.2d at 451.

Although this court may have weighed the evidence presented differently on *de novo* review, it is clear that substantial evidence in the record does support the administrative law judge's decision on this unfair practice allegation. Consequently, the Board's finding of violations based upon the threats to and the discharge of Robin Gray as a result of the employee's union activities is entitled to enforcement.

3. Adverse Job Actions Taken Against Rapunzel Hall

In the fall of 1990, Rapunzel ("Raps") Hall, a pharmacy technician at Pikeville United Methodist Hospital and an otherwise excellent employee, was presented with a blistering reprimand from her boss, Patricia McCoy. Hall's

duties were also altered at that time, moving her from a position that she claimed to enjoy immensely. All parties to this labor dispute agree that the adverse job action followed an incident in the pharmacy involving a misplaced inventory sheet. Because McCoy did not know that the sheet could be located in her cluttered office, she ordered the staff to work overtime to reconstruct the information that should have been included in the report. After finding the original sheet, McCoy accused Hall of hiding information about its existence to the detriment of the hospital. Hall maintained that had she known McCoy was looking for the same information that Hall had already provided to her, she would have alerted her boss to the sheet's existence.

The administrative law judge noted that Hall was a "very credible witness" and thus chose to believe her account of the misunderstanding. He thus concluded that the job actions taken against Hall resulted from the fact that Hall was an active participant in the union's organizational campaign. The hospital nevertheless insists that the resultant finding of unfair labor practices cannot be sustained because no evidence exists in the record to indicate that McCoy, the individual who initiated the discipline and criticism of Hall, was aware of Hall's union activity.

It is true that no direct evidence of McCoy' knowledge of Hall's union leanings is contained in the record now before the court. Testimony offered before the administrative law judge does establish, however, that McCoy and Roy Reeser, Hall's immediate supervisor, discussed with each other their dislike of evening duty on the hospital surveillance teams charged with the duty to squelch prounion conversations and activities at Pikeville United Methodist Hospital. Furthermore, Hall stated that Reeser also mentioned directly to her, "Raps, it's because of you [that we are subjected to the surveillance duty]." Based upon such evidence, it is reasonable to infer that McCoy, like Reeser, her subordinate, was aware of Hall's support of the union at the time she was disciplined. Because this

court may not displace any such reasonable inference, the finding of additional unfair labor practices against Pikeville United Methodist Hospital based upon the treatment of Rapunzel Hall should also be enforced. *See NLRB* v. *Ohio Masonic Home,* 892 F. 2d at 451.

4. Discriminatory Enforcement Of Posting Rules

The hospital next submits that the record does not contain substantial evidence to support the administrative finding that Pikeville United Methodist Hospital discriminatorily enforced its policy forbidding posting of non-work-related materials in the hospital. As stated by this court in *Union Carbide Corp.* v. *NLRB,* 714 F.2d at 660:

> The Labor Management Relations Act does not afford employees a protected interest in the use of an employer's bulletin board. Nevertheless, where, by policy or practice, the company permits employee access to bulletin boards for any purpose, section 7 of the Act, 29 U.S.C. section 157, secures the employees' right to post union materials.

(Citations omitted.)

Although the hospital does not deny that non-union, nonwork material was posted on bulletin boards throughout the hospital, it argues that there is no evidence to suggest that such material was permitted after issuance of a June 27, 1990, pre-organizational campaign policy forbidding posting of non-work material. Many of the witnesses upon whose testimony the administrative law judge relied to support his finding of a discriminatory posting policy did give only vague references to materials being posted "before the campaign started" in August 1990 and "in 1990." Other witnesses offered more date-specific evidence, however. For example, Amanda Hawkins testified that "*at the time* the union activity started" in late July or early August of 1990, wedding and shower invitations, vacation cards, and marriage notices were posted on the boards. Only after the onset of union activity were such postings removed. Lisa Ann Smith stated that it was not

until August 19, 1990, that hospital personnel forbade the posting of non-work items on the bulletin boards. Jeff Williamson and Bruce White also stated that non-union, non-work items were posted on hospital bulletin boards until September or October 1990. Again, it appears that only after a crackdown on the display of union literature were the other non-work materials ordered removed.

In short, substantial evidence exists in the record to support the administrative law judge's and the Board's findings that Pikeville United Methodist Hospital maintained different policies regarding the posting of nonwork materials on hospital bulletin boards before and after the onset of union organizing, activities at the hospital. Specifically, only after union literature was posted throughout the hospital on the employee bulletin boards was the employer's "non-work material" posting ban enforced. The finding of an unfair labor practice in this regard must, therefore, also be upheld.

5. Threatening Of Employee Thacker For Handbilling

On the morning of October 15, 1990, Ruth Thacker was passing out union leaflets when Ron White, the housekeeping supervisor, arrived with two security guards and asked Thacker and the other handbillers to move to the street and away from the hospital entrance while distributing their materials. Thacker did so, but was later approached by the guards who asked her name. Although she did not answer the question posed, she and guards engaged in pleasant conversation for approximately 15 minutes. The guards even offered the use of an umbrella to shield her from the light rain that was falling at the time.

Thacker eventually ceased her handbilling to begin her shift. After she had clocked in, however, White again approached her and asked her to identify herself. When she inquired as to the reason for the request, White simply asked again for her name. She again refused, pointed to her manager, and stated, "You can ask her." White did so, learned Thacker's identity, and immediately asked to speak with a hospital director. After being informed that the director was unavailable at that time, White left the area.

The administrative law judge and the Board determined that the actions of White and the security guards in attempting to ascertain a handbillers name, and then, in the presence of the employee, asking to speak with the director, amounted to illegal coercion, in violation of the National Labor Relations Act's safeguarding of protected labor activity. Pikeville United Methodist Hospital insists that merely asking an employee her name cannot amount to coercion and, in support of that position, cites prior Board decisions in *Rossmore House,* 269 NLRB 1176 (1984), aff'd, 760 F.2d 1006 (9th Cir. 1985), and *St. Clair Memorial Hosp.,* 309 NLRB 738 (1992).

Both *Rossmore House* and *St. Clair Memorial Hosp.,* however, are factually distinguishable from the case now before this court. In *Rossmore House,* for example, the questioning of the employee entailed only cursory inquiries into whether a union organizing effort was underway. No threats, express or implied, other than that the employers would most likely fight the unionization effort, were made to the employee. *Id.* at 1176. In *St. Clair Memorial Hosp.,* the "interrogation" of individuals concerning their identities was an attempt only to ascertain whether those persons were employees or non-employees, and thus, whether they were permitted to engage in handbilling on the employer's property. Once the information was obtained, no additional threats were made or actions taken. *Id.* at 739.

In contrast, Ron White knew in this case that Ruth Thacker was an employee of Pikeville United Methodist Hospital. In fact, he followed her to her work station, obtained her name from a co-worker, and then made the pretense of seeking an audience with Thacker's supervisor. Because of the implied threat that a report would be made to Thacker's supervisor as a result of the employee's handbilling activities, and because of the coercion inherent in such a scenario, we cannot say that the Board erred in adopting the administrative law judge's determination that such acts constituted an unfair labor practice.

6. Order To Cease Handbilling At Hospital Entrances

The Board further found that Pikeville United Methodist Hospital committed an unfair labor practice in ordering employees not to distribute handbills at the entrances to the hospital. In so concluding, the Board and the administrative law judge assumed that "on several occasions during the campaign," employees distributing handbills during non-work hours were ordered off hospital property without any evidence that the handbillers were blocking ingress to or egress from the hospital. In challenging that determination, the hospital asserts that the areas from which the employees were expelled were actually work areas from which union activity can be restricted.

The record before this court indicates that the "several occasions" to which the administrative law judge's decision refers actually involved only one instance in which prounion employees distributed handbills at both the front and back entrances to the hospital. While testimony was elicited that daily deliveries were made to the back door of the hospital, no evidence was adduced that the parking lot area near the rear entrance where the handbillers massed was a "work area." Without additional evidence of that fact, or of whether the handbillers restricted ingress to or egress from the hospital, we decline to speculate as to possible effects of the described activity, and conclude that the Board's order finding the restriction on handbilling at the back entrance to be an unfair labor practice was supported by substantial evidence.

On the other hand, the appellate record does not contain substantial evidence to support the Board's findings regarding the handbilling at the *front* entrance to the hospital. Although the evidence supports the handbillers' claims that they did not block the actual entrance to the hospital, testimony also indicates that individuals assembled *"in the area"* where patients are dropped off and picked up. Because the handbilling was thus occurring in a work area, Pikeville United Methodist Hospital could properly request that those individuals distributing the

information leave the immediate vicinity. The Board's order concerning the finding of an unfair labor practice in restricting handbilling at the *front* entrance to the hospital should not, therefore, be enforced.

7. Ordering Off-Duty Nurse To Leave Premises

Finally, Pikeville United Methodist Hospital argues that the Board erred in holding that a hospital order that off-duty nurse Jeff Williamson leave the building was a violation of the National Labor Relations Act. The Board counters by insisting that an employer may not ban an off-duty employee from non-work areas absent valid justification.

This issue centers around an incident in which Williamson, after the beginning of the organizational campaign, was at the hospital, off-duty, talking with friends in the cafeteria. Later, while walking through the lobby, he saw a supervisor, Patty Akers, who asked him why he was in the building. Caught by surprise, Williamson stated falsely that he was in the hospital to visit the mother of a co-worker. Akers took no action at that time to remove Williamson from the premises. Still later, however, Williamson encountered Akers again, this time as Williamson was walking through the emergency room. Akers took that opportunity to inform him that she had learned that the previously-discussed co-worker's mother had been discharged the previous day. Then, as Williamson walked down the back hall of the building, he was approached by security personnel, who related that Akers had requested that he be asked to leave because he was off-duty, out of uniform, and had no legitimate business in the hospital at that time.

The Board predicated its finding of an unfair labor practice in this regard on its guidelines protecting "the right of off-duty employees to express their interest in unions to employees on other shifts." The record now before this court, however, contains absolutely no evidence that Williamson remained at the hospital to discuss labor relations or other union activities. Absent even an allegation

that Akers infringed upon such a protected activity, we conclude that the Board erred in finding that this hospital decision constituted an unfair labor practice. Consequently, we must deny enforcement of that portion of the NLRB's order that finds a labor law violation in the request that Williamson leave the emergency room area while off-duty.

IV. CONCLUSION

For the reasons stated above, we conclude that the NLRB properly exercised jurisdiction over Pikeville United Methodist Hospital in this matter. Moreover, substantial evidence supports most of the Board's findings of unfair labor practices committed by the hospital. However, the record does not contain substantial evidence to support the conclusion that an off-duty employee was asked to leave the premises because of his connection with the organizational campaign or that employee handbilling should have been permitted in the work area near the front entrance to the hospital. We therefore order that the Board's order be ENFORCED IN PART AND SET ASIDE IN PART.

Nos. 95-6467/6644

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PIKEVILLE UNITED METHODIST HOSPITAL OF KENTUCKY, INC., - *Petitioner/Cross-Respondent,*

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, - - - - - *Intervenor,*

NATIONAL LABOR RELATIONS BOARD, - - - - - *Respondent/Cross-Petitioner.*

BEFORE: NELSON and DAUGHTREY, Circuit Judges; and COHN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

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*Hon. Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

Case 9-RC-15808

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 9

IN THE MATTER OF

THE METHODIST HOSPITAL OF KENTUCKY, INC.[1] - - - - - - - - - *Employer*

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, - - - - - - *Petitioner*

and

THE CITY OF PIKEVILLE, KENTUCKY - - - *Intervenor*

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act.

3. The labor organization involved claims to represent certain employees of the Employer.

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[1]The Employer's name appears as amended at the hearing.

4. It will not effectuate the purposes of the Act to assert jurisdiction herein for the following reasons:

The Employer, a nonprofit Kentucky corporation, operates a 221 bed general acute care hospital in Pikeville, Kentucky where it employs approximately 650 employees. Although there is evidence of prior organizational activity at the Employer's facility, there is no history of collective bargaining affecting any of the employees involved in this proceeding. The Petitioner seeks to represent a unit of all nonprofessional employees, excluding all professional employees, business office clerical employees, personnel employees, department heads, management employees, temporary employees, students, confidential employees, guards and supervisors as defined in the Act.

The Employer and the City of Pikeville, Kentucky (herein called the City), which intervened in this proceeding for the limited purpose of contesting the Board's jurisdiction, contend that the petition must be dismissed on the ground that the Employer shares the City's status as a political subdivision exempt from jurisdiction pursuant to Section 2(2) of the Act. Alternatively, the Employer and City argue that the Board should decline to assert jurisdiction inasmuch as the terms of the Employer's sublease with the City for the hospital facility substantially limits the former's control over employment conditions and precludes the possibility of meaningful collective bargaining. The Petitioner, contrary to the Employer and City, asserts that the Employer has always retained and exercised sufficient control over personnel issues, including employee compensation, to engage in bargaining despite its contractual relationship with the City.

Responsibility for the Employer's overall management and daily operations is vested in *John Tummons,* administrator. Tummons was selected by, and reports directly to, a 30-member board of directors. Candidates for appointment to the board are nominated by a subcommittee selected by the board's chairman and must be approved by the Kentucky Conference of the United Methodist Church. Board members serve without remuneration.

The Employer has operated hospital facilities in the Pikeville, Kentucky area since its incorporation in 1923. Its former facility was located on the campus of a small local college. In 1966 the Employer purchased the premises of the Appalachian Regional Hospital, the site of its current operations. In order to renovate and expand the existing building, the Employer and the City entered into a series of transactions designed to obtain public financing for the venture. In accordance with then existing state law, the City created a holding company, the Pikeville Kentucky Public Hospital Corporation (herein called the Public Hospital Corporation) in 1968 for the express purpose of issuing tax exempt bonds to finance the renovation. The face value of the bond issue was approximately $2,992,000 with scheduled principal and interest payments over a 40-year period. The directors of the Public Hospital Corporation were selected by the City's board of commissioners and serve without pay. In addition to the bond offering, additional funding was acquired through federal, state and regional grants as well as from private donations.

As part of the necessary arrangements to secure funding, the Employer conveyed its ownership interest in the property to the City in 1969 without retaining any reversionary interest in the site. The City, in turn, deeded the premises to the Public Hospital Corporation. The latter conveyance obligated that entity to transfer the improved site back to the City upon the final redemption and cancellation of the bonds.

The transaction also required the execution of a series of leases between the parties. The Public Hospital Corporation leased the hospital facility back to the City at an annual cost equivalent to the bond amortization rate plus related expenses. Under the terms of the lease, the City was responsible for the payment of all taxes and all costs associated with insurance and maintenance of the facility. Further, the City, or its sublessee, was obligated to operate the hospital as a city governmental project (i.e., a facility open to, and providing services for, all members of the

public). Although the lease automatically renewed on an annual basis, the City could terminate its participation after giving 90 days' advance notice. Finally, the City retained the option to purchase the facility at any time for a price equal to the total outstanding bond debt plus interest and related expenses.

The City, in turn, executed a sublease with the Employer giving it exclusive control and supervision of the hospital as long as the Employer complied with all sublease provisions. The terms and conditions of the Employer's sublease are expressly made subordinate to those enumerated in the lease between the City and the Public Hospital Corporation. Cancellation of the latter lease, either through the City's default or redemption of the bonds, simultaneously terminates the sublease. The sublease contains a provision for automatic renewal at the city's option on an annual basis and the cost to the Employer is equivalent to the City's total annual obligation to the Public Hospital Corporation. The Employer is required to maintain its status as a nonprofit, charitable corporation during the term of the sublease and is prohibited from Subletting the hospital, absent written consent by the City. Failure to comply with the sublease's provisions, including an inability to pay the requested rent, provide grounds for termination of the sublease. Finally, the sublease specifically provides that "The Methodists shall manage and operate said Hospital project, supervise the operations of all of the departments thereof in compliance herewith, pursuant to the directions of the City and with the requirement of all appropriate governmental regulations."

The record discloses that the Employer submitted a proposed annual budget to the City for approval in accordance with the sublease requirements on one occasion in 1971, the year in which the leases were executed. Despite provisions requiring such actions, there have been no audits of hospital costs or City approval of rates for patient services. Prior to 1991 there is no evidence that the City was directly involved in the daily administration, opera-

tion or management of the hospital facility or influenced the Employer's labor relations.

On December 10, 1990, subsequent to the opening of the representation hearing in this case, the City adopted a resolution authorizing its intervention in the instant proceeding. Thereafter, on January 14, 1991 the City passed a resolution effective immediately pursuant to its authority retained in the sublease directing that the Employer shall not enter into any contract of employment, whether individually extended or collectively bargained, nor shall it modify wage rates, hours of work or any employee benefit, whether pursuant to a written plan or practice, without the express written consent of the City or its designated representative." Testimony adduced at hearing disclosed that the purpose of the resolution was to preclude assertion of the Board's jurisdiction over the Employer.

It is established Board law that an entity is entitled to statutory exemption as a political subdivision under Section 2(2) of the Act if it is either: (1) created directly by the state so as to constitute a department or an administrative branch of government; or (2) administered by individuals who are responsible to public officials or to the general electorate. See, *NLRB* v. *The Natural Gas Utility District of Hawkins County, Tennessee,* 402 U.S. 600 (1971). The Employer and City concede that the Employer, a nonprofit corporation in existence since 1923, was not created by the City or any other governmental entity and thus is not exempt from jurisdiction on that basis. The parties contend, however, that the Employer shares the City's exemption under the second prong of the test based on the participation and control exercised by public officials and/or their appointees in the Employer's operation. The argument offered in support of this assertion is not persuasive.

Although some public officials (i.e., the Mayor) and representatives of the Public Hospital Corporation are members of the Employer's board of directors, they are not subject to confirmation by the City and do not serve as a consequence of any local ordinance. The record discloses

that the City has no authority to decide the composition or structure of the Employer's board of directors which is, in essence, its policy-making body. Clearly, neither the board of directors itself nor the individual members in their capacity as board members have direct personal accountability to the City or the general public. See, *Morristown Hamblen Hospital Association,* 226 NLRB 76 (1976); *Cape Girardeau Care Center, Inc.,* 278 NLRB 1018 (1986).

The parties also contend that the City's primary control over the Employer's management of the hospital as enumerated by the sublease's various provisions are sufficient to warrant a finding that the Employer shares the City's exempt status. As evidence of its plenary control, the City notes that should the Employer fail to comply with the terms of the sublease, the City may immediately terminate the Employer's right to manage the publicly-owned facility and may, in fact, cancel the arrangement at its option for any reason prior to the sublease next renewal. The City's contractual rights, vis-a-vis the Employer, however, pertain to the manner in which the Employer is required to provide services rather than defining its existence as an exempt entity.

Accordingly, based on the foregoing and the record as a whole, I find that the Employer is not a governmental agency or an entity administered by individuals responsible to public officials and thus is an employer within the weaning of Section 2(2) of the Act.

There remains for consideration the question of whether it will effectuate the purposes and policies of the Act to assert jurisdiction over the Employer given the particular circumstances presented. In *Res-Care, Inc.,* 280 NLRB 670 (1986), the Board concluded that the decision whether to assert jurisdiction over an employer providing services to an exempt entity must focus on the control retained by the employer with respect to "essential terms and conditions of employment." If the exempt entity possesses ultimate discretion over basic economic terms, then the employer cannot engage in meaningful collective bargaining and assertion of jurisdiction is not warranted.

The Employer's sublease with the City specifically provides that the management, operation and supervision of the hospital shall be pursuant to the directions of the City. Such language, standing alone Without any evidence of the City's participation in, or approval of, the-Employer's labor relations matters, does not constitute the type of control necessary to demonstrate that the Employer lacks the capacity to engage in meaningful bargaining. Nevertheless, given the City's recent resolution requiring the Employer to obtain its express written consent in order to ". . . enter into any contract of employment whether individually extended or collectively bargained, nor . . . modify wage rates, hours of work or any employee benefit. it is clear that the City now acts in a controlling rather than advisory capacity with respect to wages, benefits and personnel policies. See, *Board of Trustees of Memorial Hospital* v. *NLRB,* 624 F.2d 177 (10th Cir., 1980), cited by the Board in support of its rationale in *Res-Care, Inc.,* supra, at 673.

The Board will not assert its jurisdiction over an employer in circumstances where an exempt governmental entity has the right of disapproval over a collective-bargaining agreement entered into by that employer. See, *Board of Trustees of Memorial Hospital,* supra; *Ohio Inns,* 205 NLRB 528 (1973).

The Petitioner asserts that the contractual relationship between the Employer and City did not previously involve any approval by the City of the Employer's labor relations and the resolution asserting such control is a sham transaction devised to evade the Board's jurisdiction. The Petitioner has not, however, offered any evidence demonstrating that the City will not exercise the right of approval which it has recently claimed or that its approval of the Employer's personnel policies in the future will be routinely granted.

Based on the foregoing and the record as a whole, and noting particularly that the Employer's ability to bargain is limited by its obligation to submit any prospective col-

lective-bargaining agreement to the City, an exempt entity, for approval, I find that the Employer lacks sufficient control over employment conditions to engage in meaningful negotiations. Accordingly, I conclude that it would not effectuate the purposes and policies of the Act to assert jurisdiction herein and I shall dismiss the petition.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by July 17, 1991.

Dated at Cincinnati, Ohio this 3rd day of July 1991.

/s/ Edward Verst
Edward C. Verst, Acting Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 95-6467/6644

PIKEVILLE UNITED METHODIST HOSPITAL OF KENTUCKY, INC., - *Petitioner/Cross-Respondent,*

v.

NATIONAL LABOR RELATIONS BOARD, - - - - - *Respondent/Cross-Petitioner,*

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, - - - - - *Intervenor.*

JUDGMENT—Filed May 14, 1997

Before: NELSON and DAUGHTREY, Circuit Judges; COHN, District Judge.[*]

THIS CAUSE came on to be heard upon a petition filed by Pikeville United Methodist Hospital of Kentucky, Inc., to review an order of the National Labor Relations Board in Board Case Nos. 9-CA-27863, 9-CA-27932, 9-CA-27938, 9-CA-28003, and 9-CA-28041, issued on September 15, 1995, and upon a crossapplication filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on November 19, 1996, and has considered the briefs and transcript of record filed in this cause. On April 1, 1997, the Court, being fully advised in the premises, handed down its decision in which it enforced in part, and set aside in part order of the Board. In conformity therewith, it is hereby ORDERED AND AD-

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(*) The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

JUDGED by the Court that the Petitioner, Pikeville United Methodist Hospital of Kentucky, Inc., Pikeville, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Soliciting grievances from employees and promising to rectify those grievances, and taking an employee opinion survey, all with the intent to discourage employees' support of and activities on behalf of the Union.

(b) Coercively interrogating employees about their union activities and sympathies, threatening employees with unspecified trouble if they signed a union authorization card, and prohibiting employees from discussing the Union, all to discourage employees' support of and activities on behalf of the Union.

(c) Creating and utilizing so-called Employee Support Teams for the purpose of surveilling its employees to discourage employees' support of and activities on behalf of the Union.

(d) Discriminatorily enforcing its rules regarding posting of material on bulletin boards by allowing the posting of nonwork related material while prohibiting the posting of union literature, to discourage employees' support o f and activities on behalf of the Union.

(e) Impliedly threatening an employee who had been distributing union literature by asking her to identify herself and asking the location of her supervisor, creating the impression that her union activities were under surveillance, to discourage employees! support of and activities on behalf of the Union.

(f) Telling its employees that they cannot distribute union literature in its parking lots and ordering them to leave, to discourage employees' support of and activities on behalf of the Union,**

**to the extent the parking lots are not work areas and handbilling does not restrict ingress or egress from the hospital.

(g) Orally promulgating a rule prohibiting employees from talking about the Union while eating lunch in the Petitioner's paint shop and threatening to prohibit employees from eating lunch in the paint shop, to discourage employees' support of and activities on behalf of the Union.

(h) Impliedly threatening an employee with loss of her job unless she became antiunion, to discourage employees' support of and activities on behalf of the Union.

(i) Giving its employees unsatisfactory employee evaluations, to discourage employees' support of and activities on behalf of the Union.

(j) Giving its employees, written warnings and changing their job duties, to discourage employees' support of and activities on behalf of the Union.

(k) Suspending and discharging its employees to discourage employees' support of and activities on behalf of the Union.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act ("the Act").

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

(a) Offer full and immediate reinstatement to Robin Gray to her former or substantially equivalent position, discharging, if necessary, any employee hired to replace her, and make her whole for any loss of wages or benefits she may have suffered by her unlawful suspension and discharge, with interest, in the manner set forth in the remedy section of the administrative law judge's decision.

(b) Rescind the unsatisfactory employee evaluation given to Judy Webb on September 9, 1990, and the written warning given to Rapunzel Hall on November 1, 1990, and on her request, restore Rapunzel Hall's job duties taken away from her on November 1, 1990.

(c) Expunge from its personnel records all references to Robin Gray's suspension and discharge, Judy Webb's September 9, 1990 employee evaluation, and Rapunzel Hall's November 1, 1990, written warning, and give Robin Gray, Judy Webb, and Rapunzel Hall written notice that this has been done and assure them in writing that these unlawful actions will not be used as a basis for future personnel actions concerning them.

(d) Preserve and, upon request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records, and reports and all other records necessary or useful in complying with the terms of this Judgment.

(e) Post at its facility in Pikeville, Kentucky, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 9 of the National Labor Relations Board (Cincinnati, Ohio), after being signed by the Petitioner's authorized representative, shall be posted by the Petitioner immediately upon receipt and maintained for 60 consecutive days in conspicuous places' including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Petitioner to ensure that the notices. are not altered, defaced, or covered by any other material.

(f) Notify the said Regional Director, in writing, within 20 days from the date of this Judgment, what stops the Petitioner has taken to comply.

IT IS FURTHER ORDERED that costs shall be taxed against the Petitioner.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

In recognition of these rights, we hereby notify our employees:

WE WILL NOT solicit grievances from employees and promise to rectify those grievances, and take an employee opinion survey, with the intent of discouraging employees' support of and activities on behalf of the Union.

WE WILL NOT coercively interrogate our employees about the union activities and sympathies, threaten our employees with unspecified trouble if they sign a union authorization card, and prohibit our employees from discussing the Union, to discourage our employees' support of and activities on behalf of the Union.

WE WILL NOT create and utilize so-called Employee Support Teams for the purpose of surveilling our employees to discourage our employees' support of and activities on behalf of the Union.

WE WILL NOT discriminatorily enforce our rules regarding posting of material on bulletin boards by allowing

the posting of nonwork related material while prohibiting the posting of union literature, to discourage employees' support of and activities on behalf of the Union.

WE WILL NOT impliedly threaten our employees who are distributing union literature by asking them to identify themselves and asking the location of their supervisors, creating the impression that their union activities are under surveillance, to discourage employees' support of and activities on behalf of the Union.

WE WILL NOT tell our employees that they cannot distribute union literature in our parking lots and order them to leave, to discourage employees' support of and activities on behalf of the Union, to the extent the parking lots are not work areas and handbilling does not restrict ingress or egress from the hospital,

WE WILL NOT orally promulgate a rule prohibiting employees from talking about the Union while eating lunch in the Respondent's paint shop and threaten to prohibit employees from eating lunch in the paint shop, to discourage employees' support of and activities on behalf of the Union.

WE WILL NOT impliedly threaten our employees with loss of their jobs unless they became antiunion, to discourage employees' support of and activities on behalf of the Union.

WE WILL NOT give our employees unsatisfactory employee evaluations, to discourage employees' support of and activities on behalf of the Union.

WE WILL NOT give our employees written warnings or change their job duties, to discourage employees' support of and activities on behalf of the Union.

WE WILL NOT suspend or discharge our employees, to discourage employees' support of and on behalf of the Union.

** to the extent the parking lots are not work related areas and handbilling does not restrict ingress or egress from the hospital.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL NOT offer full and immediate reinstatement to Robin Gray to her former or substantially equivalent position, discharging, if necessary, any employee hired to replace her, and make her whole for any loss of wages or benefits she may have suffered by her unlawful suspension and discharge, with interest.

WE WILL rescind the unsatisfactory employee evaluation given to Judy Webb on September 9, 1990, and the written warning given to Rapunzel Hall on November 1, 1990, and upon her request, restore Rapunzel Hall's job duties taken away from her on November 1, 1990.

WE WILL expunge from our personnel records all references to Robin Gray's suspension and discharge, Judy Webb's September 9, 1990 employee evaluation, and Rapunzel Hall's November 1, 1990 written warning, and give Robin Gray, Judy Webb, and Rapunzel Hall written notice that this has been done and assure them in writing that these unlawful actions will not be used as a basis for future personnel actions concerning them.

PIKEVILLE UNITED METHODIST
HOSPITAL OF KENTUCKY, INC.

Cases 9-CA-27863
9-CA-27932
9-CA-27938
9-CA-28003
9-CA-28041

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 9

IN THE MATTER OF

METHODIST HOSPITAL OF KENTUCKY, INC.

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

ORDER POSTPONING HEARING

IT IS HEREBY ORDERED that the hearing heretofore scheduled for March 4, 1991 at 1 p.m. (EST) in Pikeville, Kentucky be, and it hereby is, postponed pending consideration of the jurisdictional issue raised in Case 9-RC-15808.

Issued at Cincinnati, Ohio this 5th day of February 1991.

/s/ Edward C. Verst
Edward C. Verst, Acting Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

ORDER RESCHEDULING HEARING

Cases 9-CA-27863
9-CA-27932
9-CA-27938
9-CA-28003
9-CA-28041

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 9

IN THE MATTER OF

METHODIST HOSPITAL OF KENTUCKY, INC.

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

IT IS HEREBY ORDERED that the hearing in these cases be, and it hereby is, rescheduled for December 7, 1992 at 1 p.m. (EST) in the Jury Room, Third Floor, Ball of Justice, 89 Division Street, Pikeville, Kentucky.

Issued at Cincinnati, Ohio this 13th day of August 1992.

/s/ D. Randall Frye
D. Randall Frye, Regional Director
Region 9, National Labor Relations Board
3003 John Velc Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

ORDER DENYNG NOTION

Case 9-CA-27863 et al.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

PIKEVILLE, KY

THE METHODIST HOSPITAL OF KENTUCKY, INC.

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

On January 4, 1991, the Acting Regional Director for Region 9 issued an Order Consolidating Cases, Second Amended Complaint and Notice of Hearing in the above-captioned cases alleging that the Respondent had committed unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

Thereafter, on November 2, 1992, the Respondent filed a Motion for Summary Judgment. The Respondent contends that the jurisdictional holding in 9-RC-15808 finding that it would not effectuate the purposes of the Act to assert jurisdiction over the Respondent, precludes relitigation of that issue in these cases. The Respondent also contends that there are no genuine issues of material fact regarding the reconized exceptions to this doctrine and, in any event, with regard to the recognized exception of cases in which the Board retains jurisdiction in order to further the public policy of not abandoning alleged discriminatees, most of the allegations should be summarily dismissed.

On December 8, 1992, Counsel for the General Counsel filed a memorandum in opposition to the Respondent's motion in which he initially argues that the alleged unfair labor practices occurred at a time prior to ouster of the

Board's discretionary jurisdiction. The General Counsel contends that the action causing this ouster, a City resolution of January 14, 1991, was preempted by federal law and thus void. Additionally, the General Counsel contends that he should be allowed to relitigate the jurisdictional issue because there is currently no evidence to indicate that the Respondent has altered its operations based upon the January 14, 1991 resolution passed by the City of Pikeville. Finally, the General Counsel asserts that the decision in 9-RC-15808 was based on an incomplete record which did not raise all the relevant considerations and supporting authorities.

The Charging Party, in its memorandum in opposition filed December 4, 1992, argues that the City's resolution is preempted and therefore vo*Id.* It also asserts that the jurisdictional holding in the R case is not binding in the C case. The Charging Party argues that the unfair labor practices occurred before the City's resolution, at a time when the employees were unquestionably covered by the Board's discretionary jurisdiction and at a time when employees were reasonably entitled to believe they were protected by the Act. Finally, the Charging Party asserts that the Employer has not shown that it is entitled to judgment as a matter of law.

Having duly considered the matter, the Respondent's motion is denied because it raises genuine issues of material fact which would best be resolved after a hearing before an administrative law judge.

IT IS ORDERED that the Respondent's notion for summary judgment is denied and the proceeding is remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C. , January 4, 1993.

By direction of the Board:
Joseph E. Moore

Deputy Executive Secretary

DEED

THIS DEED, made and entered into as of the first day of July, 1969, by and between the CITY OF PIKEVILLE, KENTUCKY, party of the first part, hereinafter sometimes referred to as the "Grantor," and the PIKEVILLE, KENTUCKY, PUBLIC HOSPITAL CORPORATION, a Kentucky Corporation, c/o Methodist Hospital Unit 2, Pikeville, Kentucky 41501, party of the second part, hereinafter referred to as the "Grantee,"

WITNESSETH:

WHEREAS, the Grantee has been organized in cooperation with the Grantor, for the purpose of providing funds to be applied to finance the cost, not otherwise provided, of the construction of renovation and additions to the existing Methodist Hospital in Pikeville, Kentucky, pursuant to the so-called "holding company" plan of financing, virtually identical with the type of plan approved by the Court of Appeals of Kentucky in its decisions in the cases of *Baker* v. *City of Lexington*, Ky., 273 S.W. 2d 34, and *Warren County Fiscal Court* v. *Warren County T. B. Sanitorium*, Ky., 272 S.W. 2d 332, and

WHEREAS, in that connection, the Grantor has acquired title to said existing Methodist Hospital and the ground on which it is located, and has initiated the construction of said renovations and additions through interim financing, and it is necessary and desirable that the Grantor convey said hospital property to the Grantee, for the purpose of enabling said Grantee to finance the cost, not otherwise provided, of the construction of said renovations and additions, and to lease said hospital property to the Grantor, and

WHEREAS, the execution of this Deed has been duly authorized by appropriate action of the Board of Commissioners of the City of Pikeville,

NOW, THEREFORE, in consideration of the payment of the sum of One Dollar from the Grantee to the Grantor, the receipt of which is hereby acknowledged in full, and in

order to carry out the plan of financing referred to above, the Grantor does hereby convey to the Grantee, in fee simple, with Covenant of General Warranty, the property hereinafter described, located in the City of Pikeville, Pike County, Kentucky, and more particularly described as follows:

PIKEVILLE HOSPITAL SITE

A tract or parcel of land lying and being on the waters of Harold's Branch, a tributary of Levisa Fork of Big Sandy River in Pike County, Kentucky, more particularly bounded and described as follows, to wit:

BEGINNING at a stake on the South right of way line of the county road on Harold's Branch; thence leaving the said right of way line and running S 17º 45' W 91.40 feet, crossing Harold's Branch, to a 1" pipe; thence S 17º 45' W 172.03 feet to a 1" pipe at the base of the hill; thence up the hill S 17º 40' W 134.53 feet to a stake; thence S 17º 33' W 221.28 feet to a 4" Els stump; thence S 18º 15' W 257.43 feet to a stake; thence S 17º 20' W 165.63 feet to a 1" maple stump; thence S 18º 28' W 85.46 feet to a 1" white oak stump; thence S 18º 28' W 70.26 feet to a 1" Hickory stump on the center of the ridge between Harold's Branch and the Levisa Fork of the Big Sandy River; thence down and with the center of said ridge N 70º 26' W 85.70 feet to a 1" Hickory stump; thence N 50º 39' W 139.93 feet to a 1" Hickory stump; thence N 60º 00' W 94.46 feet to a 1" Hickory stump; thence N 73º 38' W 69.57 feet to a nail in a root of a 15" chestnut oak; thence S 87º 36' W 102.48 feet to a nail in a root of a 3" dogwood; thence S 89º 35' W 133.73 feet to a 4" white oak stump; thence S 86º 40' W 136.94 feet to an x-mark on a rock; thence N 85º 46' W 118.56 feet to a nail in a root of a 3" dogwood; thence N 79º 52'W 83.34 feet to a 1" Hickory stump; thence N 81º 22' W 157.59 feet to a 2" White Oak stump; thence N 66º 27' W 79.56 feet to a nail in the base of a 24" white oak; thence N 38º 20' W 161.95 feet to an x-mark on a large rock; thence N 36º 28' W 95.54 feet to an x-mark on a rock; thence N 25º 45' W 85.76 feet to a nail in a root of an 18" hickory; thence N 23º 42' W 138.36 feet to a 1" pine

stump on a knob; thence N 8º 15' E 139.73 feet to a nail in a root of a 10" hickory; thence N 33º 16' E 218.16 feet to a nail in the base of a 22" white oak stump; thence N 17º 49' E 156.84 feet to a 2" hickory stump; thence N 17º 21' E 99/.56 feet to a 1" hickory stump at the butt of the ridge; thence down and with the center of a point N 48º 09' E 62.06 feet to an x-mark on a high rock; thence S 24º 00' W 138 feet to a nail in a root of a 14" hickory; thence N 35º 52' E 195.59 feet to a nail in a root of a 10" beech; thence N 17º 17' E 192.90 feet to a 2" beech stump; thence N 13º 43' E 99.88 feet to a nail in a root of a 6" hickory; thence N 33º 38' E 140.73 feet to a nail in a root of a 7" pine; thence N 24º 09' E 103.90 feet to a 1" elm stump; thence N 20º 37' E 112.86 feet to a 1" elm stump on the south right of way line of U. S. Route 119; thence leaving the center of the said point and running down and with the said U. S. Route 119 right of way line in a Northeasterly direction 308 feet, more or less, to its intersection with the said Harold's Branch right of way line; thence leaving the said U. S. Route 119 right of way line and running up and with the said Harold's Branch right of way line in a Southeasterly direction 1380 feet, more or less, back to the beginning, containing 53.25 acres.

Excepting and reserving a strip of land along Highway 23 which was conveyed to the Commonwealth of Kentucky for highway widening purposes by Deed dated December 3, 1956, and recorded in Deed Book 372, Page 314, in the office of the County Clerk of Pike County, Kentucky.

Being the same property acquired by the City of Pikeville, Kentucky, by Deed dated _____, 197__, and recorded in Deed Book /////illegible/////, page ///// illegible/////, in the office of the County Clerk of Pike County, Kentucky.

Together with all existing buildings and improvements located thereon of every kind and description and those hereafter erected or placed thereon, and all fixtures, including but not limited to, all gas and electric fixtures, engines and machinery, radiators, heaters, furnaces (heat-

ing and incinerating) laundry and air conditioning equipment, steam and hot-water boilers, stoves, ranges, elevators and motors, bathtubs, sinks, water closets, basins, pipes, faucets and other plumbing and heating fixtures, mantels, refrigerating-plant and refrigerators, whether mechanical or otherwise, cooking apparatus and appurtenances, and all articles of personal property now or hereafter attached to and/or used in and about the Methodist Hospital in Pikeville, which are necessary to the complete and comfortable use and occupancy of said hospital, including beds, furniture, x-ray equipment and all other pertinent hospital equipment, shades, awnings, screens, blinds and other furnishings, whether previously in existence or financed by the Bonds referred to below, subject to reasonable rights of substitution and replacement, scrapping of obsolete items, remodeling, repairs and refurnishing, and provided that all renewals or replacements or articles in substitution thereof, whether or not the same are or shall be attached to the hospital property in any manner, shall also be subject to the provisions hereof.

The Grantor covenants that it is lawfully seized of the estate hereby conveyed, that it has full right and power to convey the same and that said conveyance is made under the following conditions and covenants, to wit:

1. The Grantee will cause to be issued approximately $2,992,000 of First Mortgage Revenue Bonds to be secured by a first revenue pledge and by a first mortgage lien upon the property herein conveyed.

2. The proceeds of said Bond Issue are to be used by the Grantee, together with other available funds, to accomplish the construction of renovations and additions to the existing Methodist Hospital in Pikeville on the property hereby conveyed, all in accordance with a Contract, Lease and Option made and entered into on this date by the parties hereto, in the manner specified and set out therein and under the supervision of the Grantor.

SUBLEASE AGREEMENT

THIS SUBLEASE AGREEMENT, made and entered into as of the first day of July, 1969, by and between the CITY OF PIKEVILLE, KENTUCKY, a fourth class City, of Pike County, Kentucky, party of the first part, hereinafter referred to as the "City," THE METHODIST HOSPITAL OF KENTUCKY, INC., a non-profit corporation of the City of Pikeville, Kentucky, party of the second part, hereinafter referred to as "the Methodists," and the PIKEVILLE, KENTUCKY, PUBLIC HOSPITAL CORPORATION, a non-profit corporation of the City of Pikeville, Kentucky, party of the third part, hereinafter referred to as "the Corporation,"

WITNESSETH:

WHEREAS, it is the desire of the City that the Corporation finance the cost, not otherwise provided, of the remodeling of the existing hospital building in the City of Pikeville and the construction of an addition to said building, on the site hereinafter described, together with all furnishings, equipment and necessary appurtenances thereto, all of the foregoing being hereinafter sometimes collectively referred to as the "construction project," said existing hospital and the site thereof, as same now exists and as same may be hereafter constituted, being hereinafter referred to as the "Hospital Project," and

WHEREAS, said existing hospital has heretofore been conveyed by the Methodists to the City and is being concurrently conveyed by the City to the Corporation, as a part of financing the cost, not otherwise provided, of said construction project, pursuant to a plan of financing of the type approved by the Court of Appeals of Kentucky in the case of *Baker* v. *City of Lexington*, Ky., 273 S.W. 2d 34, and *Warren County Fiscal Court* v. *Warren County T. B. Sanatorium*, Ky., 272 S. W. 2d 332, and

WHEREAS, the City has arranged for the Corporation to issue $2,992,000 principal amount of "Pikeville, Kentucky, Public Hospital Corporation First Mortgage Rev-

enue Bonds of 1969," consisting of $1,000,000 of Series A Bonds, $1,500,000 of Series B Bonds and $492,000 of Series C Bonds, with the provision that the proceeds of the Series A and B Bonds will be used to finance the cost, not otherwise provided, of the aforesaid construction project, and the Series C Bonds will be issued to refinance a certain EDA Note, which is secured by a mortgage constituting a present lien against the existing hospital property, and

WHEREAS, said plan of financing involves the Corporation taking title to the property, issuing $2,500,000 of (Series A and B) Bonds to finance the aforesaid costs (not otherwise provided), to lease said Hospital Project to the City is a Contract, Lease and Option from the Corporation to the City for an initial period of one year from July 1, 1971 to June 30, 1072, with an exclusive option to the City in said Contract, Lease and Option to renew said Lease from year to year for periods of one year at a time, at such rentals as will be sufficient to pay the principal and interest requirements of said Bonds as same become due and to accumulate certain reserves in connection therewith, and

WHEREAS, it is contemplated that the City will derive the revenues necessary to pay such rentals to the Corporation under said Contract, Lease and Option, from the rentals payable to the City by the Methodists in this Sublease Agreement (with the exception of that portion of the interest requirements that will be capitalized out of the proceeds of the Series A and B Bonds), and that the Methodists will be enabled to administer and operate said Hospital Project from and after the date of execution hereof,

NOW, THEREFORE, IN CONSIDERATION OF THE FOREGOING AND OF THE MUTUAL COVENANTS OF THE PARTIES HERETO, THE PARTIES AGREE AS FOLLOWS:

1. SUBLEASE FROM CITY TO METHODISTS.

That the City, as Sublessor, hereby subleases said Hospital Project to the Methodists, as Sublessee, do hereby

lease said Hospital Project from the date hereof, to the extent that said Hospital Project can be occupied by the Methodists without interfering with the construction of the remodeling and improvements to the Hospital Project, and the Methodists do further lease said Hospital Project from the City for an initial rental period of one year from the first day of July, 1971, the estimated date of completion of said construction project, to June 30, 1972, at an agreed and stipulated rental of $179,085.00 plus the fee of the Trustee, if any, plus surplus revenues, if any, derived from the operation of the Hospital Project, for the purpose of the Capital Improvements Reserve Fund, created in the Mortgage Trust Indenture hereinafter referred to.

* * * *

but the Methodists shall in each year become indebted to the City for the rentals stipulated herein and become bound in all other respects as herein provided, upon and only upon, the exercise of the City's option to renew as set out herein.

5. TERMINATION AND/OR CANCELLATION.

Should the Methodists fail to pay the rentals due under this Sublease Agreement at the times herein stipulated, then the City, at its option, may terminate the rights of the Methodists under the Sublease Agreement upon thirty days' notice to the Methodists, unless within such 30 day period, such default shall be cured and none of the Bonds shall have been defaulted during such time, provided, however, that the obligations of the Methodist to pay rentals for the current year and with reference to maintaining insurance on the Hospital Project and to operate, repair, replace, renovate and improve same, shall continue until the expiration of the current rental year, and provided further that upon the termination taking place by reason of the default of the Methodists, the City shall have the right to sublease, re-sublet or re-subrent the Hospital Project to another party or parties for the account of the Methodists and hold the Methodists liable for any rental

differential loss suffered by the City for the balance of the then current rental term plus all remaining option renewal terms hereunder.

6. RIGHTS OF METHODISTS TO TERMINATE UPON TERMINATION OF CONTRACT, LEASE AND OPTION.

If the City shall, for any reason, fail to renew its lease of said property under the aforementioned Contract, Lease and Option, or shall for any reason forfeit its rights thereunder, all rights of the Methodists under this Sublease Agreement shall terminate simultaneously therewith.

The Methodists shall have the exclusive control and supervision of the Hospital Project so long as this Sublease Agreement continues in effect and so long as the Methodists are in compliance with all of the terms and conditions of this Sublease Agreement; provided, however, that the rights of the Methodists under this Sublease Agreement cannot exceed the rights of the City under said Contract, Lease and Option, and the rights of the Methodists hereunder shall automatically terminate if and whenever the rights of the City under said Contract, Lease and Option shall terminate for any reason.

Upon redemption and/or retirement of all of the $2,992,000 of Bonds referred to above, and upon transfer of title to the Hospital Project from the Corporation to the City, this Sublease Agreement shall expire and terminate, and the Methodists shall thereupon give immediate possession of the Hospital Project to the City, after which all covenants and obligations hereunder shall thereupon be cancelled, except as to any then unpaid rental obligations, if any; subject to the rights of the parties to negotiate any new lease or other appropriate arrangement, if any, with reference to said Hospital Project.

7. CANCELLATION BY CITY FOR INADEQUATE REVENUES.

In the event that the revenues received by the City from the operation of the Hospital Project shall at any

time be insufficient to enable the City to comply with its obligations in said Contract, Lease and Option, this Sublease Agreement may immediately be cancelled by the City.

8. PROPERTY SUBLEASED.

The property constituting the subject of this Sublease Agreement is located in the City of Pikeville, Pike County, Kentucky, and more particularly described as follows:

PIKEVILLE HOSPITAL SITE

A tract or parcel of land lying and being on the waters of Harold's Branch, a tributary of Levisa Fork of Big Sandy River in Pike County, Kentucky, more particularly bounded and described as follows, to wit:

BEGINNING at a stake on the South right of way line of the county road on Harold's Branch; thence leaving the said right of way line and running S 17º 45' W 91.40 feet, crossing Harold's Branch, to a 1" pipe; thence S 17º 45' W 172.03 feet to a 1" pipe; thence S 17º 45' W 172.03 feet to a 1" pipe at the base of the hill; thence up the hill S 17º 40' W 143.53 feet to a stake; thence S 17º 33' W 221.28 feet to a 4" Els stump; thence S 18º 15' W 257.43 feet to a stake; thence S 17º 20' W 165.63 feet to a 1" maple stump; thence S 18º 28' W 85.46 feet to a 1" white oak stump; thence S 18º 28' W 70.26 feet to a 1" Hickory stump on the center of the ridge between Harold's Branch and the Levisa Fork of the Big Sandy River; thence down and with the center of said ridge N 70º 26' W 85.70 feet to a 1" Hickory stump; thence N 50º 39' W 139.93 feet to a 1" Hickory stump; thence N 60º 00' W 94.46 feet to a 1" Hickory stump; thence N 73º 38' W 69.57 feet to a nail in a root of a 15" chestnut oak; thence S 87º 36' W 102.48 feet to a nail in a root of a 3" dogwood; thence S 89º 35' W 133.73 feet to a 4" white oak stump; thence S 86º 40' W 136.94 feet to an x-mark on a rock; thence N 85º 46' W 118.56 feet to a nail in a root of a 3" dogwood; thence N 79º 52'W 83.34 feet to a 1" Hickory stump; thence N 81º 22' W 157.59 feet to a 2" White Oak stump; thence N 66º 27' W 79.56 feet to a nail in the base of a 24" white oak; thence N 38º 20' W 161.95 feet to an x-mark on a large rock; thence N

36º 28' W 95.54 feet to an x-mark on a rock; thence N 25º 45' W 85.76 feet to a nail in a root of an 18" hickory; thence N 23º 42' W 138.36 feet to a 1" pine stump on a knob; thence N 8º 15' E 139.73 feet to a nail in a root of a 10" hickory; thence N 33º 16' E 218.16 feet to a nail in the base of a 22" white oak stump; thence N 17º 49' E 156.84 feet to a 2" hickory stump; thence N 17º 21' E 99.56 feet to a 1" hickory stump at the butt of the ridge; thence down and with the center of a point N 48º 09' E 62.06 feet to an x-mark on a high rock; thence S 24º 00' W 138 feet to a nail in a root of a 14" hickory; thence N 35º 52' E 195.59 feet to a nail in a root of a 10" beech; thence N 17º 17' E 192.90 feet to a 2" beech stump; thence N 13º 43' E 99.88 feet to a nail in a root of a 6" hickory; thence N 33º 38' E 140.73 feet to a nail in a root of a 7" pine; thence N 24º 09' E 103.90 feet to a 1" elm stump; thence N 20º 37' E 112.86 feet to a 1" elm stump on the south right of way line of U. S. Route 119; thence leaving the center of the said point and running down and with the said U. S. Route 119 right of way line in a Northeasterly direction 308 feet, more or less, to its intersection with the said Harold's Branch right of way line; thence leaving the said U. S. Route 119 right of way line and running up and with the said Harold's Branch right of way line in a Southeasterly direction 1380 feet, more or less, back to the beginning, containing 53.25 acres.

Excepting and reserving a strip of land along Highway 23 which was conveyed to the Commonwealth of Kentucky for highway widening purposes by Deed dated December 3, 1956, and recorded in Deed Book 372, Page 314, in the office of the County Clerk of Pike County, Kentucky.

Being the same property acquired by the Pikeville, Kentucky, Public Hospital Corporation by Deed dated as of July 1, 1969, and recorded in Deed Book 499, Page 558, in the Pike County Clerk's office, and by Deed of Correction dated as of July 1, 1969, and recorded in Deed Book 503, Page 133, in said office.

Together with:

(a) All existing buildings and improvements located thereon of every kind and description and those hereafter erected or placed thereon, and all fixtures, including but not limited to, all gas and electric fixtures, engines and machinery, radiators, heaters, furnaces (heating and incinerating), laundry and air conditioning equipment, steam and hot-water boilers, ranges, elevators and motors, bathtubs, sinks, water closets, basins, pipes, faucets and other plumbing and heating fixtures, mantels, refrigerating plant and refrigerators, whether mechanical or otherwise, cooking apparatus and appurtenances, and all articles of personal property now or hereafter attached to and/or used in and about the Hospital Project, which are necessary to the complete and comfortable use and occupancy of such Hospital Project, including beds, furniture, x-ray equipment and all other pertinent hospital equipment, shades, awnings, screens, blinds and other furnishings, whether previously in existence or financed by said Bonds, subject to the following:

(1) The Corporation, the City and/or the Methodists shall have the right to substitute furnishings, operating machinery and equipment, of a like or greater value, provided that such items so withdrawn, and for which substitution has been made, shall become the property of the party which has made this substitution, free and clear of the mortgage lien created herein; and provided further that all renewals or replacements or articles installed in substitution of other items, whether or not same are or shall be attached to the Hospital Project in any manner, shall also be subject to the provisions hereof.

(2) From any source other than funds derived from revenues of the Hospital Project, the Corporation, the City and/or the Methodist may install (without substitution) in the Hospital Project, equipment and other personal property to which the installing party shall retain title, regarding of how such equipment and other personal property may be attached or affixed to the premises. The right to remove such equipment and

other personal property at any time is recognized, so long as the removing party is not in default with regard to its obligation under this Contract, Lease and Option, the Sublease Agreement and/or the Indenture, as the case may be, and provided that any damage to the Hospital Project caused by such removal shall be repaired by the removing party; provided any such equipment or personal property acquired through funds derived from revenues of the Hospital Project shall become a part of the Hospital Project, subject to the provisions hereof. In order that equipment and other personal property which is a part of the Hospital Project may be identified, each piece of equipment or personal property which is a part of the Hospital Project shall be tagged or labelled in appropriate manner; and each such item which is not a part of the Hospital Project shall also be separately tagged or labelled; and the Corporation shall furnish or cause to be furnished to the Trustee a list of such equipment and personal property, which list shall be kept current.

(3) The Corporation reserves the right (at the request of the City and/or of the Methodists) to grant or release, with or without consideration, from this instrument and from the lien securing the Bonds, such easements, rights-of-way, licenses or other rights over, upon or beneath the surface of the land as may reasonably be required for roads, utilities, drainage and similar purposes in connection with the use and occupancy of the Hospital Project, provided that efficient operation of the Hospital Project and ingress to and egress from such Hospital Project, shall not thereby be impaired,

(b) All rents, issues, proceeds and profits accruing and to accrue from said premises.

Provided, however, that the parties hereto acknowledge the fact that the title to said Hospital Project property is subject to the following:

A. The restrictions, easements, oil and gas leases, rights-of-way and conveyance which are contained in prior instruments of record in the Pike County Clerk's office.

B. The oil and gas lease from Marvin Ratliff, et al., to

United Carbon Company, dated March 13, 1948, of record in Deed Book 298, Page 35, in said office, together with agreement concerning use of surface of subject property, between Memorial Hospital Association of Kentucky, Inc., and United Carbon Company, dated November 18, 1952, and recorded in Deed Book 314, Page 21, in said office.

C. A right-of-way to the Kentucky and West Virginia Power Company for power lines, of record in Deed Book 208, Page 573, in said office.

D. A right-of-way to the Kentucky and West Virginia Power Company for power lines, of record in Deed Book 307, Page 30, in said office.

E. A right-of-way to the Kentucky and West Virginia Power Company for power lines, dated February 21, 1950, of record in Deed Book 343, Page 440, in said office.

F. A claim of the heirs of P. E. Rogers, Thomas Rogers and Elise Rogers, that the power line and sanitary sewer easement appurtenant to said property acquired from Marvin Ratliff and others for sewer line purposes encroaches upon the property of such heirs.

G. A Declaration of Trust, dated September 30, 1964, and of record in Deed Book 455, Page 437, in said office.

9. NET, NET SUBLEASE.

The parties hereto intend that this Lease shall be deemed and construed to be a "net sublease," and the City shall receive all rent due hereunder from the Methodists free of any charges, assessments, expenses or deductions of any and every kind, character or nature whatsoever; and the Methodists shall pay any and all taxes, charges and assessments, if any, against the Hospital Project.

The Methodists assume the sole responsibility for the condition, operation, maintenance and management of the Hospital Project, and the City shall have no liability in respect thereto, or for damage to same or on account of the condition, operation, maintenance and management of same.

The Methodists shall pay or cause to be paid, on or before the due date thereof, all charges for water, gas, sewers,

electricity, light, heat, power, telephone and other services used, rendered or supplied to the Methodists in connection with its use and occupancy of the Hospital Project.

10. METHODISTS ASSUME COMMITMENTS OF THIS CITY.

The parties hereto certify that in the aforementioned Mortgage Trust Indenture and in the aforementioned Contract, Lease and Option, the Corporation has made various covenants to the Trustee and the City has assumed the obligation of performing such covenants. It is therefore recognized that during the initial term of this Sublease and so long as this Sublease shall be renewed and effective, the Methodists shall, subject to the provisions hereof, manage, maintain and operate the Hospital Project, and it is therefore agreed that during the initial rental term and so long as this Lease is renewed and continues in effect, the Methodists assume the duty and obligation of, and shall comply with all of such covenants undertaken by, the Corporation to the Trustee in the Mortgage Trust Indenture and all of such covenants undertaken by the City to the Corporation in the Contract, Lease and Option.

11. MANAGEMENT AND OPERATION OF HOSPITAL.

The Methodists shall manage and operate said Hospital Project, supervise the operation of all of the departments thereof in compliance herewith, pursuant to the directions of the City and with the requirements of all appropriate governmental regulations, including those of the Federal Hill-Burton Act and those of the Loan Agreements between the City and the DHUD and the City and the EDA, respectively (at least so long as said EDA and DHUD, respectively, hold any of such Bonds), and including, but not by way of limitations, any and all requirements with regard to making the hospital available to a reasonable number of patients and operation of the Hospital Project on a nondiscriminatory basis, as to patients, employees, members of the Hospital (Project) staff and physicians permitted to use the facilities of the Hospital Project.

12. EXPERIENCE OF METHODISTS.

The Methodists will in general afford the City the benefit of the previous experience, knowledge, buying power, trained personnel, good will and prestige of the Methodists.

13. APPOINTMENT OF MANAGER.

The Methodists will appoint a capable, sober resident manager and administrator and necessary divisional heads, deemed capable of maintaining and operating said Hospital Project as a licensed, duly accredited, first class hospital.

14. FIDELITY BONDS OF EMPLOYEES.

Adequate fidelity bonds will be maintained by the Methodists on employees engaged in the operation of the Hospital Project, the premiums for which shall be budgeted and charged to operating costs.

15. RATES.

The Methodists will charge, on behalf of the City, such rates for the services and facilities of the Hospital Project as are specified in the annual budget adopted by the City, which shall become the budget of the Methodists, subject to such interim revisions in such rates as may from time to time be approved by the City, subject also to appropriate provisions for indigent patients. The Methodists will further observe and comply with the requirements of the annual budget, subject to such variations therefrom as may be specified and/or approved by the City.

16. DEPOSITS OF FUNDS.

All funds and revenues derived by the Methodists from the operation of the Hospital Project shall be deposited by the Methodists in a revenue fund account of the City maintained in such bank(s) as shall be directed by the City. Such funds shall be disbursed by the Methodists as contemplated by the aforesaid budget for the cost of maintaining and operating the Hospital Project, including all wages and compensation of operating personnel, materials and supplies, laundry, the payment of taxes, insurance and

workers; compensation and liability premiums, and the payment as rentals of sufficient sums in ample time to discharge the City's obligations and commitments under the aforesaid Contract, Lease and Option between the City and the Corporation, being amounts sufficient to meet all current debt services and other requirements of the Mortgage Trust Indenture. Any balance of the net revenues remaining thereafter, shall, unless otherwise required by said budget, be applied:

(a) to retire or redeem bonds in advance of maturity; or

(b) to make or finance capital improvements to the hospital; or

(c) to enhance and improve the services and/or facilities of the hospital; as specified by the City.

17. RECORDS, AUDITS AND BOOKKEEPING.

The Methodists will supervise the operations of every department of the Hospital Project, including all audits and bookkeeping, as may be required by the City; and all records of the Methodists as to such Hospital Project shall be open to inspection of the City, its attorneys and auditors at all reasonable hours. The Methodists will take all action necessary to comply with the covenant of the City as to audits and reports contained in Section 15 of the Contract, Lease and Option.

18. PAYMENT OF EXPENSES.

All proper costs, expenses, losses or damages incurred in the operation of the hospital, shall be paid from time to time by the Methodists from funds which may be derived from the operation of the hospital. The availability of surplus revenues after payment of such items shall not affect the obligation of the Methodists to pay the rentals specified hereunder, as such rentals are payable by the Methodists unconditionally and are not limited to available revenues of the project. The Methodists shall be liable only for a loss or damage sustained by reason of discretionary or negligence on the part of its officers or employees.

19. STATUS OF SUBLESSEE AS EXEMPT ORGANIZATION.

The Methodists warrant that they are (it is) a non-profit charitable corporation and that it is an organization of the class referred to in Section 103(c)(3)(D) of the Internal Revenue Code of the United States as "an organization described in Section 501(c)(3) and exempt from tax under Section 501(a) . . .". The City certifies, and the Methodists acknowledge, that the City would not have entered into this Sublease Agreement except for the status of the Methodists as a non-profit and tax-exempt organization. The Methodists covenant to maintain said status during the initial term of this Sublease Agreement, and of any renewal thereof, and to continue to operate the property hereto issued for the public purpose intended, as permitted by law.

20. EASEMENTS AND RIGHTS-OF-WAY.

The Corporation and the City reserve the right, at the request of the Methodists, to grant or release, with or without consideration, such easements, rights-of-way, license or other rights over, upon or beneath the surface of the land as may reasonably be required for roads, utilities, drainage and similar purposes in connection with the use and occupancy of the Hospital Project, provided that efficient operation of the Hospital Project is not impaired.

21. ASSIGNMENT.

The Methodists may not assign or transfer this Sublease Agreement or sublet the whole or any part of the leased premises without the written consent of the City, and the City shall not assent to the assignment of this Sublease Agreement except to an "exempt person" within the meaning of Section 103(c) of the Internal revenue Code of the United States.

22. THIS SUBLEASE INFERIOR AND SUBORDINATE TO CONTRACT, LEASE AND OPTION AND MORTGAGE DEED OF TRUST.

This Sublease Agreement is in all respect subject to and subordinate to the Contract, Lease and Option between the Corporation and the City, dated as of the first day of July, 1969, and is subject to and subordinate to the Mortgage Trust Indenture between the Corporation and the Trustee securing said $2,992,000 of Bonds authorized to be issued by said Corporation.

23. ASSIGNMENT OF RENTALS TO TRUSTEE.

In order to insure against the possibility of default in the payment of the Bonds and the coupons referred to, it is agreed that the City hereby assigns to the Corporation the rental payable from the Methodists to the City and since the Corporation has heretofore assigned to the Trustee the rentals payable from the City to the Corporation, it is agreed that the Methodists shall pay the rentals herein provided at the time and in the manner herein stipulated, direct to said Trustee so that said rentals may be received by the Trustee for the bondholders for application in strict accordance with the terms and provisions of the Mortgage Trust Indenture securing the Bonds.

IN TESTIMONY WHEREOF, the City has caused this instrument to be executed for and on its behalf by its duly authorized Mayor and the Seal of the City, to be affixed hereto and attested by its City Clerk, the Methodists have caused this instrument to be executed for and on behalf of the Methodists by their duly authorized President, and the Seal of the Methodists to be affixed and attested by the Secretary of the Methodists, and the Corporation has caused this instrument to be executed for and on behalf by its duly authorized President, its Corporate Seal to be affixed and attested by its Secretary, pursuant to the respective proceedings of the governing bodies of said parties, all as of the date first above written.

City of Pikeville, Kentucky
By /s/ W. C. ////illegible////
Mayor

[SEAL]

Attest:

/s/ ////illegible////
City Clerk

The Methodist Hospital of
Kentucky, Inc.
By /s/ W. E. Elliott
President

[SEAL]

Attest:

/s/ ////illegible////
Secretary

Pikeville, Kentucky, Public
Hospital Corporation
By /s/ W. Ernest Elliott
President

[SEAL]

/s/ John ////illegible////
Secretary

STATE OF KENTUCKY }
} ss.
COUNTY OF PIKE }

[Seal of Notary]

On this 29th day of March, 1971, before me, a Notary Public in and for the State and County aforesaid, personally appeared W. C. Hambley, M.D., and Charles L. Huffman, Jr., personally known to me and personally known to me to be the Mayor and the City Clerk, respectively, of the City of Pikeville, Kentucky, and who, being duly sworn according to law, acknowledged the execution of the within Sublease Agreement to be their free act and deed and free act and deed of said City, for the uses and purposes therein stipulated, duly authorized by resolution of its Board of Commissioners.

My Commission expires: April 4, 1974.

/s/ Billie ////illegible////
Notary Public, Pike County,
Kentucky

STATE OF KENTUCKY }
} ss.
COUNTY OF PIKE }

[Seal of Notary]

On this 31st day of March, 1971, before me, a Notary Public in and for the State and County aforesaid, personally appeared W. Ernest Elliott and Vivian W. Day, personally known to me and personally known to me to be the President and the Secretary, respectively, of The Methodist Hospital of Kentucky, Inc., and who, being duly sworn according to law, acknowledged the execution of the within Sublease Agreement to be their free act and deed and free act and deed of The Methodist Hospital of Kentucky, Inc., for the uses and purposes therein stipulated, duly authorized by resolution of its Board of Commissioners.

My Commission expires: April 15, 1974.

/s/ ////illegible////
Notary Public, Pike County,
Kentucky

STATE OF KENTUCKY }
} ss.
COUNTY OF PIKE }

[Seal of Notary]

On this 31st day of March, 1971, before me, a Notary Public in and for the State and County aforesaid, personally appeared W. Ernest Elliott and John B. Dupuy, Jr., personally known to me and personally known to me to be the President and the Secretary, respectively, of the Pikeville, Kentucky, Public Hospital Corporation, and who, being duly sworn according to law, acknowledged the ex-

ecution of the within Sublease Agreement to be their free act and deed and free act and deed of said Corporation, for the uses and purposes therein stipulated, duly authorized by resolution of its Board of Commissioners.

My Commission expires: April 15, 1974.

/s/ ////illegible////
Notary Public, Pike County,
Kentucky

This instrument was prepared by Rubin & Trautwein, 203 Tyler Building, Louisville, Kentucky 40202 — 585-2153.

By /s/ Joseph R. Rubin
Joseph R. Rubin

STATE OF KENTUCKY }
COUNTY OF PIKE } Clerk's Certificate of Judgment and Record

I, John Paul Blair, Clerk of the County Clerk Court for the County and State aforesaid, certify that the foregoig Sublease Agmt. on the 6th day of May, 1971 lodged for record at 410C. Whereupon the same with the foregoing and this certificate have been duly recorded in my office.

Witness my hand this 11th day of May, 1971.

John Paul Blair, Clerk
By /s/ ////illegible////

RESOLUTION

WHEREAS, the City of Pikeville, Kentucky, a Third Class City, created Pikeville Kentucky Public Hospital Corporation, a non-profit corporation of the City of Pikeville, Kentucky to hold title to all real estate and improvements located on the By Pass Road in Pikeville pursuant to the issuance of Revenue Bonds in 1969, upon which real estate is located a hospital facility; and,

WHEREAS, the City of Pikeville, Kentucky and its creation, Pikeville Kentucky Public Hospital Corporation, own the hospital facility; and,

WHEREAS, the City of Pikeville, Kentucky, the Pikeville Kentucky Public Hospital Corporation and Methodist Hospital of Kentucky, Inc., a non-profit corporation, entered into a Sublease Agreement dated Januar y 1, 1969, recorded in Deed Book 50.3 Page, 134, which specifically sets forth that the City of Pikeville, Kentucky shall lease said real estate and hospital facility to' Methodist Hospital of Kentucky, Inc., on an annual basis; and,

WHEREAS, pursuant to said Sublease Agreement Methodist Hospital of Kentucky, Inc.. is authorized to manage and operate the hospital facility pursuant to the directions of the City of Pikeville, Kentucky; and,

WHEREAS, the City of Pikeville, Kentucky has vital interests in the financial condition of the hospital facility including, but not limited to, the ongoing availability of affordable quality hospital services to citizens of the City and the surrounding area and the retirement of Revenue Bonds on which the City of Pikeville, Kentucky is indebted through the year 2009; and,

WHEREAS, the terms and conditions of employment, as well as the number of employees by category or classification of said hospital facility could critically affect said interests;

BE IT HEREBY RESOLVED, that the City of Pikeville, Kentucky by and through its authority retained in the Sublease Agreement, directs that its sublessor, Methodist

Hospital of Kentucky, Inc., shall not enter into any contract of employment, whether individually extended or collectively bargained, nor. shall it modify wage rates, hours of work or any employee benefit, whether pursuant to a written plan or practice, without the express written consent of the City of Pikeville, Kentucky or its designated representative.

BE IT FURTHER RESOLVED that this Resolution shall immediately be transmitted to the appropriate representative of Methodist Hospital of Kentucky, Inc., and shall be effective upon receipt.

Adopted this 14th day of January, 1991.

/s/ Walter E. May
Walter E. May, Mayor for the
City of Pikeville, Kentucky

ATTESTED:

/s/ Karen W. Harris
Secretary

RESOLUTION

WHEREAS, the Board of Commissioners of the City of Pikeville, Kentucky, is authorized to designate a representative to oversee certain personnel policies and practices of the Methodist Hospital of Kentucky, Inc.

BE IT HEREBY RESOLVED, that the Mayor of the City of Pikeville is in his official capacity, designated as the representative of the City of Pikeville for the above described purpose.

At Pikeville, Kentucky, this 14th day of January, 1991. Commissioner FRANK MORRIS made the motion to adopt the foregoing Resolution. Commissioner WALTER BLANKENSHIP seconded the motion.

Upon call of the roll, the motion carried by the following votes:

	YES	NO
WALTER E. MAY, MAYOR	X	___
WALTER BLANKENSHIP, COMMISSIONER	X	___
EUGENE DAVIS, COMMISSIONER	X	___
FRANK MORRIS, COMMISSIONER	X	___
JOHNNY MOUNTS, COMMISSIONER	X	___

The Mayor declared the within Resolution adopted.

/s/ Walter E. May
Walter E. May, Mayor

ATTEST:

/s/ Karen Harris
Karen Harris, City Clerk

RESOLUTION

WHEREAS, the City of Pikeville, Kentucky, created Pikeville, Kentucky Public Hospital Corporation, a non-profit corporation of the City of Pikeville, Kentucky to hold title to all real estate improvements located on the By-Pass Road in Pikeville pursuant to the issuance of Revenue Bonds in 1969, upon which real estate is located a hospital facility; and,

WHEREAS, the City of Pikeville, Kentucky and its creation, Pikeville, Kentucky Public Hospital Corporation, own the hospital facility; and,

WHEREAS, the City of Pikeville, Kentucky, the Pikeville, Kentucky Hospital Corporation and the Methodist Hospital of Kentucky, Inc., a non-profit corporation, entered into a Sublease Agreement dated January 1, 1969, which specifically requires in Paragraph 10 that the Methodist Hospital of Kentucky, Inc. shall comply with all the covenants undertaken by the City of Pikeville to the Pikeville, Public Hospital Corporation in a certain Contract, Lease and Option Agreement entered into between the City of Pikeville and Pikeville, Kentucky, Public Hospital Corporation dated July 1, 1969.

WHEREAS, in said Contract, Lease and Option greement between the City of Pikeville and Pikeville, Kentucky, Public Hospital Corporation, pursuant to Section 17, the City in the operation of the Hospital Project is required to comply with all Federal and State laws and regulations, including those the Hill-Burton Act, and including those applicable to the Hill-Burton Act, and including all laws and regulations applicable to DHUD and EDA Loan Agreement with the City and specifically including the requirement of non-discrimination as to members of the hospital staff;

WHEREAS, certain provisions of the Hill-Burton Act, the DHUD and EDA agreements, and the Civil Rights Act of 1964 prohibit discrimination against the individual with respect to his employment because of such individual's religion;

WHEREAS, the First Amendment to the Federal and State Constitution prohibits the establishment of any religion or prohibiting the free exercise thereof;

WHEREAS, the Articles of Incorporation and By-Laws of the Pikeville Methodist Hospital contains discriminatory language which requires that the hospital administrator be a member of the Methodist Church and three-fourths (3/4) of the members of the Board of Directors to be members of the Methodist Church; and further require the promotion and facilitation of religious activities;

WHEREAS, the Pikeville City Commission has determined that the articles and by-laws of the Pikeville Methodist Hospital, Inc. are in violation of State and Federal Law, the terms and conditions of the grant agreements for funds received by the City of Pikeville to construct the Hospital project and further in breach of the sublease agreement between the City of Pikeville and the Methodist Hospital of Kentucky, Inc. dated June 1, 1969;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY OF PIKEVILLE AS FOLLOWS:

1. That the Methodist Hospital is hereby notified that its Articles of Incorporation and By-Laws are in violation of the aforementioned state and Federal laws, the terms and conditions of certain Public Grant Agreements, and the contract provisions between the City of Pikeville and the Methodist Hospital of Kentucky, Inc.

2. That the City of Pikeville request that said problem be cured by an amendment to the Articles of Incorporation and By-Laws of the Pikeville Methodist Hospital so to delete the following references:

A. Article II, Section 1 - purpose to maintain a Christian hospital.

B. Article III, Section 2 - requirement that at least 18 members of the Board of Directors be members of the Methodist Church and requiring the pastors of the Methodist Church, the First Methodist Church of Paintsville, the Prestonsburg Methodist Church and First Methodist

Church of Ashland, the district superintendent of the Ashland Division and the supervising bishop of the Kentucky Conference to be members of the Board.

C. Article III, Section 3 - requirement that the property be used in accordance to the usage and discipline of said church how it is now or as it from time to time shall be established, made or declared the lawful authority of said church and further that it be sold, encumbered or disposed of according to the provisions of the laws of the church relating to church property.

D. Article VIII, Section 4, Paragraph F - requirement that there be a religious emphasis committee to general supervision of the religious activities of the hospital and the school of training.

E. Article IX - requirement that the administrator be a member of the Methodist Church.

3. That the Methodist Hospital of Kentucky, Inc. shall notify the City of Pikeville in writing when it has cured the aforementioned problems and shall provide the City of Pikeville in said notice a copy of the Amended Article of Incorporation and By-Laws of the Methodist Hospital of Kentucky, Inc.

Passed this 25th day of February, 1991.

Commissioner Frank Morris moved the adoption of the foregoing resolution. Commissioner Walter Blankenship seconded the motion.

Upon roll call, the votes were as follows:

	YES	NO
WALTER E. MAY, MAYOR	_X_	___
GENE DAVIS, COMMISSIONER	Absent	
FRANK MORRIS, COMMISSIONER	_X_	___
JOHNNY MOUNTS, COMMISSIONER	Not Voting	
WALTER BLANKENSHIP, COMMISSIONER	_X_	___

The Mayor declared the within resolution adopted.

/s/ Walter E. May
Walter E. May, Mayor

ATTEST:
/s/ Karen Harris
Karen Harris, City Clerk

THIRD ARTICLES OF TO THE ARTICLES OF INCORPORATION OF THE METHODIST HOSPITAL OF KENTUCKY

1. The present name of the corporation is THE METHODIST HOSPITAL OF KENTUCKY, although it is sometimes referred to as Methodist Hospital of Kentucky, Inc.

2. The Articles of Incorporation of the corporation as previously amended are further amended so that as last amended they shall read in their entirety (except with respect to the name and mailing address of the incorporators) as follows:

AMENDED ARTICLES

ARTICLE I

The name of the corporation shall be PIKEVILLE UNITED METHODIST HOSPITAL OF KENTUCKY, INC.

ARTICLE II

The purpose of the corporation shall be for all lawful purposes authorized by KRS 273.167 as authorized by the laws of the Commonwealth of Kentucky including the establishment and operation of a Christian benevolent and charitable institution of giving medical and surgical care to the sick, wounded and suffering.

ARTICLE III

The duration of the corporation shall be perpetual.

ARTICLE IV

The street address of the corporation's registered office shall be 232 Second Street, Pikeville, Kentucky 41502, and the name of its registered agent at that address shall be Pamela Todd Robinette, Esq. The mailing address of the corporation's principal office shall be By-Pass Road, Pikeville, Kentucky 41501.

ARTICLE V

Section 1.

The corporation. shall be governed by a Board of Directors consisting of twenty-five (25) members, twenty-four

(24) of which shall be elected as herein provided and the number of which shall be changed only by amendment to these Articles of Incorporation. The Chief of Staff of the Pikeville United Methodist Hospital of Kentucky shall be an ex-officio voting member of the Board. The Bishop of The Kentucky Conference of The United Methodist Church shall be an ex-officio non-voting member of the Board.

Section 2.

The Board of Directors shall elect fifteen (15) of its members after the report of the Nominating Committee is made and after an opportunity has been given to the full Board to make nominations from the floor. In addition to the fifteen (15) members elected by the Board, the Board of Directors shall recommend nine (9) directors to the Commission on Health Welfare Ministries of The Kentucky Annual Conference of The United Methodist Church who shall nominate persons from these recommendations and/or their own selections. These nominees shall be submitted to the Conference for election.

Section 3.

Members elected by the Board shall be divided into three (3) classes with five (5) members each. The members of one (1) such class shall be elected at its March Meeting each year for a term of three (3) years. At least two (2) of the five (5) members of each class elected by the Board shall be members of The United Methodist Church.

Section 4.

Members elected by the Conference shall be divided into three (3) classes of three (3) members each. The members of one (1) such class shall be elected at the regular session of the Conference each year for a term of three (3) years. At least one (1) of the three (3) members of each class shall be a legal resident of Pike County.

Section 5.

In the event that a vacancy shall occur in the Board elected membership because of the resignation, death or

other cause, the Board of Directors by a majority vote at any regular or special meeting may elect a new member to fill the unexpired term of the vacancy using the same election procedures as set out in § 2. In the event that a vacancy shall occur in the Conference elected membership because of resignation, death or other cause, the Board of Directors by a majority vote at any regular or special meeting may recommend a new member to fill the vacancy using the same procedures as set out in § 2. The names of any new Conference elected members shall be submitted for approval by the Commission on Health and Welfare Ministries of the Kentucky Annual Conference to serve until the next regular session of the Kentucky Annual Conference of The United Methodist Church.

Section 6.

The names and mailing addresses of the persons constituting the initial Board of Directors shall be as follows:

Board Elected

Class of 1992	Class of 1993	Class of 1994
Joe Dean Anderson	Masten Childers	Dave Collins
Reed Potter	T.T. Colley	Hobart C. Johnson
Judy Walters	Hugh B. Hall	Patty May
George Wells	Lacy Puckett	Walter E. May
George Williamson	John Rasnick	Danny Stratton

Conference Elected

Class of 1992	Class of 1993	Class of 1994
Burlin Coleman	Bill Baird	Alcie Combs
Lowell Langefeld	Bruce Elliott	Gary Justice
Frank Nall	Bonnie Todd	Eddie Venters

Section 7.

The above Directors shall serve until their successors be elected and qualified.

ARTICLE VI

The title to the corporation's property, real and personal, shall be vested in the Board of Directors, who shall hold such property in trust for the use of the Kentucky

Annual Conference of The United Methodist Church and subject to the usages and the Discipline of The United Methodist Church, as it now is or as it from time to time shall be established, made and declared to be the lawful authority of the said church, providing such Discipline is not in conflict with state or federal law. Any disposition of any interest in real property shall be subject to the approval of the Board of Trustees of the Kentucky Annual Conference of The United Methodist Church.

ARTICLE VII

The ByLaws and Articles of this Corporation may be amended at any regular meeting of the Board of Directors of the Corporation by two-thirds (2/3) majority of all those present and voting. Eighteen (18) voting members shall constitute a quorum at any meeting which votes on an amendment to the Articles of Incorporation or ByLaws. Amendments to ByLaws shall become effective when the above requirements have been satisfied regarding voting. The Chairman of the Board of Trustees of the Kentucky Annual Conference of The United Methodist Church shall be informed directly and specifically of any amendments to ByLaws. Amendments to Articles shall become effective upon approval of such amendments by the Board of Trustees of the Kentucky Annual Conference of The United Methodist Church.

ARTTCLE VIII

Indemnification of Directors and Officers

The corporation shall, to the fullest extent permitted by, and in accordance with the provisions of, KRS Chapters 271 B and 273, indemnify each director or officer of the corporation against expenses (including attorneys' fees), judgments, taxes, fines, and amounts paid in settlement, incurred by him/her in connection with, and shall advance expenses (including attorneys' fees) incurred by him/her in defending, any threatened, pending or completed action, suit or proceeding (whether civil or criminal,. administrative or investigative) to which he/she is, or is threatened to

be made, a party by reason of the fact that he/she is or was a director or officer of the corporation, or is or was serving at the" request of the corporation as a director, officer, or agent of another domestic or foreign corporation, partnership, joint venture, trust or other enterprise. Advancement of expenses shall be made upon receipt of an undertaking, with such security, if any, as the Board of Directors may reasonably require, by or on behalf of the person seeking indemnification to repay amounts advanced if it shall ultimately be determined that he/she is not entitled to be indemnified by the corporation as authorized herein.

The indemnification provided for by this Article shall not be deemed exclusive of any other rights to which directors or officers of the corporation may be entitled under any statute, agreement, by-law, or action of the Board of Directors of the corporation, or otherwise, and shall continue as to a person who has ceased to be a director or officer of the corporation, and shall inure to the benefit of the heirs, executors, and administrators of such person.

The corporation may purchase and maintain insurance on behalf of any Person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, or agent of another domestic or foreign corporation, partnership, Joint venture, trust or other enterprise, against any liability asserted against him/her and incurred by him/her in such capacity or arising out of. his/her status as such, whether or not the corporation would have. the power or be obligated to indemnify him against such liability under the provisions of this Article or KRS Chapters 271 B and 273.

3. There being no members of the corporation, the foregoing Third Articles of Amendment were adopted by a threefourths (3/4) majority of the Directors present and voting at a regular meeting of the Board of Directors of the corporation held in Pikeville, Kentucky, on Sept. 23, 1991, at which a quorum was present (20 Directors being in attendance), a copy of the Third Articles of Amendment

having been presented at a prior regular meeting of the Board of Directors and a copy thereof also having been mailed to each member of the Board of Directors at least ten days prior to the meeting on ////illegible////, 1991. The foregoing Third Articles of Amendment were ratified and approved by a majority vote of The Kentucky Annual Conference of The United Methodist Church at a special session thereof duly held at Lexington, Kentucky, on Sept. 2, 1991, at which session a quorum was present.

IN WITNESS WHEREOF, triplicate originals of these Third Articles of Amendment have been duly executed by Walter May, Chairman of the Board of Directors of The Methodist Hospital of Kentucky (a/k/a Methodist Hospital of Kentucky, Inc.) on Sept. 27, 1991.

/s/ Walter E. May
Walter May, Chairman of the Board of Directors of The Methodist Hospital of Kentucky, (a/k/a Methodist Hospital of Kentucky, Inc.)

STATE OF KENTUCKY

COUNTY OF PIKE

The foregoing Third Articles of Amendment to the Articles of Incorporation of The Methodist Hospital of Kentucky (a/k/a Methodist Hospital of Kentucky, Inc.) were acknowledged before me this day by Walter May, Chairman of the Board of Directors of The Methodist Hospital of Kentucky, a Kentucky corporation.

Given under my hand this 27th day of Sept.

My Commission Expires: 8/31/92

/s/ Pamela T. Robinette
NOTARY PUBLIC

THIS INSTRUMENT WAS PREPARED BY:

/s/ Pamela Todd Robinette
Pamela Todd Robinette
Attorney at Law
P.O. Box 851
Pikeville, KY 41502

FILED
OCT 20 1997
CLERK

(2)

No. 97-308

In the Supreme Court of the United States

OCTOBER TERM, 1997

PIKEVILLE UNITED METHODIST HOSPITAL OF KENTUCKY, INC., PETITIONER

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

SETH P. WAXMAN
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

25 pp

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that petitioner is not a "State or political subdivision thereof" exempt from the Board's jurisdiction under Section 2(2) of the National Labor Relations Act, 29 U.S.C. 152(2).

2. Whether the Board acted reasonably in concluding that it should no longer decline, as a matter of discretion, to exercise jurisdiction over certain employers who provide services to or for governmental entities that are exempt from the Board's jurisdiction, and that it should exercise jurisdiction over any such employer who meets the statutory definition of "employer" and applicable monetary jurisdictional amounts.

3. Whether a Board procedural rule precluded the Board from reconsidering, in the unfair labor practice proceeding in this case, its decision in a prior representation case that it would not, as a matter of discretion, exercise its statutory jurisdiction over petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-308

PIKEVILLE UNITED METHODIST HOSPITAL OF KENTUCKY, INC., PETITIONER

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 105a-127a) is reported at 109 F.3d 1146. The decision and order of the National Labor Relations Board (Pet. App. 1a-4a) and the decision of the administrative law judge (Pet. App. 5a-104a) are reported at 318 N.L.R.B. 1107. The Board's decision in the representation proceeding (Pet. App. 129a-136a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1997. Pet. App. 137a-143a. A petition for rehearing was denied on June 26, 1997. Pet. App. 128a. The petition for a writ of certiorari was filed on

August 15, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 2(2) of the National Labor Relations Act (Act), 29 U.S.C. 152(2), provides, in pertinent part, that "[t]he term 'employer' * * * shall not include * * * any State or political subdivision thereof." Section 14(c)(1) of the Act, 29 U.S.C. 164(c)(1), provides, in pertinent part, that "[t]he Board, in its discretion, may * * * decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction."

2. Petitioner is a private nonprofit corporation that operates a hospital in Pikeville, Kentucky. Pet. App. 8a, 43a, 112a. Petitioner was originally incorporated in 1923 as the Methodist Hospital of Kentucky. *Id.* at 106a. In the mid-1960s, to raise funds required by petitioner to renovate and expand the hospital, the City of Pikeville (City) created a holding company, the Pikeville, Kentucky Public Hospital Corporation (Corporation), to issue tax-exempt bonds for the construction costs. *Id.* at 8a. As part of the financing mechanism, petitioner conveyed its ownership interest in the hospital's property to the City, and the City conveyed the property to the Corporation. The Corporation then leased the property back to the City, and the City in turn sublet the property back to petitioner. *Id.* at 8a-9a, 106a.

The sublease between petitioner and the City provided that petitioner "shall manage and operate" the hospital "pursuant to the directions of the City."

Pet. App. 10a; see also *id.* at 152a-168a. In fact, the City did not become involved in the management or operation of the hospital. Only once, in 1971, did the hospital submit its budget to the City for approval, and the City never audited the hospital's costs or approved the hospital's rates. "Prior to 1991 there is no evidence that the City was directly involved in the daily administration, operation or management of the hospital facility or influenced the [hospital's] labor relations." *Id.* at 107a.

3. a. In the summer of 1990, the United Steelworkers of America (Union) began an organizing campaign among petitioner's non-professional employees. Pet. App. 13a, 108a. On October 29, 1990, the Union filed a representation petition requesting an election with the National Labor Relations Board (Board). *Id.* at 6a. Petitioner requested that the Board dismiss the Union's petition for lack of jurisdiction. *Id.* at 130a. In the fall of 1990, the Union also filed unfair labor practice charges with the Board based on incidents during the organizing campaign. *Id.* at 5a. On January 4, 1991, the Board's Acting Regional Director (ARD) issued a complaint against petitioner, based on the Union's unfair labor practice charges. *Ibid.* In answering the complaint, petitioner reasserted its jurisdictional defense. *Id.* at 14a. The ARD ordered the hearing on the Union's unfair labor practice charges postponed pending consideration of the jurisdictional issue in the representation case. *Id.* at 144a.

On January 14, 1991—while a hearing in the representation case was in progress before the Board's hearing officer—the City Commission of the City of Pikeville passed a resolution, ostensibly pursuant to its authority under the sublease. Pet. App. 14a. The

resolution provided, in pertinent part: "[Petitioner] shall not enter into any contract of employment, whether individually extended or collectively bargained * * * without the express written consent of the [City] or its designated representative." *Id.* at 15a; see also *id.* at 169a-170a.

b. On July 3, 1991, the ARD dismissed the Union's representation petition. Pet. App. 129a-136a. Initially, the ARD rejected petitioner's contention that it was exempt from the statutory definition of "employer" under Section 2(2) of the Act as a "political subdivision" of the State of Kentucky. *Id.* at 134a. The ARD stated that an entity is an exempt "political subdivision" under Section 2(2) "if it is either: (1) created directly by the state so as to constitute a department or an administrative branch of government; or (2) administered by individuals who are responsible to public officials or to the general electorate." *Id.* at 133a (citing *NLRB* v. *Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971)). The ARD found that petitioner was not a "political subdivision" under either prong of that test because it was concededly not "created by the City or any other governmental entity" (*ibid.*), and because its board of directors, petitioner's "policy-making body," lacked "direct personal accountability to the City or the general public." *Id.* at 134a.

The ARD nonetheless concluded that "it would not effectuate the purposes and policies of the Act" for the Board to assert its jurisdiction over petitioner. Pet. App. 136a. In reaching that conclusion, the ARD applied the analysis required by the Board's decision in *Res-Care, Inc.*, 280 N.L.R.B. 670 (1986). In *Res-Care*, the Board held that it would decline to exercise its jurisdiction over employers that provided services

to or for exempt governmental entities unless the employer in question retained "final say on the entire package of employee compensation, i.e., wages and fringe benefits," on the reasoning that "meaningful bargaining is not possible" for employers without such a "final say." *Id.* at 674. The ARD concluded, based on *Res-Care*, that petitioner lacked "sufficient control over employment conditions to engage in meaningful negotiations." Pet. App. 136a. The ARD relied on the City Commission's then-recent resolution prohibiting the hospital from entering into employment contracts without its consent, which, he believed, demonstrated that "the City now acts in a controlling rather than advisory capacity with respect to wages, benefits and personnel policies." *Id.* at 135a. The ARD also noted that, on the record before him, there was no evidence that the resolution was "a sham transaction devised to evade the Board's jurisdiction." *Ibid.* The Board denied the Union's request for review of the ARD's decision in the representation case. *Id.* at 7a.

c. On November 2, 1992, petitioner moved for summary judgment in the unfair labor practice proceeding. Pet. App. 7a. Petitioner argued that the Board's jurisdictional ruling in its favor in the representation case precluded the Board's General Counsel from relitigating that issue in the unfair labor practice proceeding. *Id.* at 146a. The Board denied petitioner's motion, finding that it raised "genuine issues of material fact which would best be resolved after a hearing before an administrative law judge." *Id.* at 147a.

d. On July 8, 1994, an administrative law judge (ALJ) issued a decision on the Union's unfair labor practice charges, finding that petitioner had engaged

in several unfair labor practices. Pet. App. 5a-104a. On the question of jurisdiction, the ALJ concluded that the Board should exercise its jurisdiction over petitioner. The ALJ first ruled that the Board's jurisdictional ruling in the representation case did not preclude relitigation of that issue in the unfair labor practice case. *Id.* at 40a-43a. The ALJ also determined, as had the ARD, that petitioner was not a "political subdivision" of the State of Kentucky exempt from the Board's jurisdiction under Section 2(2) of the Act. *Id.* at 27a-29a. But unlike the ARD, the ALJ concluded that the facts before him indicated that the Board should as a matter of discretion exercise its jurisdiction under *Res-Care*. *Id.* at 38a. The ALJ found that the City's ostensible control over petitioner, purportedly established by the sublease and the City Commission's January 14, 1991 resolution, was "a sha[m] designed solely to defeat the Board's jurisdiction." *Id.* at 30a. The ALJ found that the City Commission's "actions designed to show city control are only an illusion and not a reality," and that even after the 1991 resolution, the City "did nothing thereafter but grant routine approval of [petitioner's] actions or requests for action." *Id.* at 31a.

4. The Board affirmed the ALJ's findings and conclusions and adopted his recommended remedial order. Pet. App. 1a-4a. The Board noted that, after the issuance of the ALJ's decision, it had overruled its *Res-Care* decision in *Management Training Corporation*, 317 N.L.R.B. 1355 (1995), which "established a new test for the assertions of jurisdiction over employers who operate pursuant to contracts with exempt governmental entities." Pet. App. 2a. Under *Management Training*, the Board

"will now consider only whether the employer meets two criteria: (1) the definition of 'employer' under Section 2(2) of the Act and (2) the applicable monetary jurisdictional standards." *Ibid.* The Board found that petitioner "meets both criteria of *Management Training*." *Ibid.*[1] The Board further concluded, in agreement with the ALJ, that even under its former *Res-Care* standard, "the Board's jurisdiction over [petitioner] is warranted here," because the City Commission's resolution purportedly changing the relationship between itself and petitioner "was a sham transaction," and petitioner "retained sufficient control over essential terms and conditions of employment to enable it to engage in meaningful collective bargaining." *Id.* at 3a.

5. The court of appeals enforced the Board's order in relevant part. Pet. App. 105a-127a. The court held first that petitioner was not a "political subdivision" of the State of Kentucky exempt from the Board's jurisdiction under Section 2(2) of the Act. The court stated that an entity is statutorily exempt from Board jurisdiction only if it is either "(1) created

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[1] The Act authorizes the Board to conduct elections where a representation question "affecting commerce" exists, and to prevent unfair labor practices "affecting commerce." 29 U.S.C. 159(c)(1), 160(a). Under the Board's established monetary jurisdictional standards for identifying those cases in which the effect of a labor dispute on commerce would be sufficiently substantial to warrant the exercise of the Board's jurisdiction, a hospital must, among other things, have gross annual revenues exceeding $250,000. Pet. App. 3a, 114a n.4; *East Oakland Community Health Alliance, Inc.*, 218 N.L.R.B. 1270 (1975). Petitioner does not challenge the Board's finding (Pet. App. 3a) that it satisfied the applicable monetary jurisdictional standard.

directly by the state, so as to constitute [a] department[] or administrative arm[] of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." *Id.* at 111a-112a (quoting *NLRB* v. *Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604-605 (1971); brackets in court of appeals' opinion). Petitioner, the court concluded, "possesses neither of the recognized attributes of a statutorily exempt employer." Pet. App. 112a. First, petitioner was concededly created as a private entity. Second, although the City appoints the members of the board of directors of the holding company (the Corporation),

> [n]o law or ordinance, however, requires that the board of directors of [petitioner] be elected by the general populace or requires that those board members be public officials also serving on the board of the holding company. In fact, many individual hospital board members who are responsible for administration of [petitioner] have no connection whatsoever with the holding company board of directors or with the Pikeville municipal government. The record in this matter contains absolutely no evidence to support the contention that the City of Pikeville has authority to control the membership of the *hospital's* board of directors.

Ibid.

The court also rejected petitioner's argument that the Board lacked authority to adopt its new *Management Training* standard. The court held that "the Board has offered a supportable rationale for its decision to alter the *Res-Care*, Inc. standard," namely, that " '[i]t was shortsighted . . . for the

Board to declare [in *Res-Care, Inc.*] that bargaining is meaningless unless it includes the entire range of economic issues.' * * * [T]he focus of negotiations may be upon such matters as job security, job classifications, employer flexibility in assignments, employee involvement or participation and the like," Pet. App. 115a (quoting *Management Training*, 317 N.L.R.B. at 1357), all of which may be within the power of the employer. The court expressly agreed with a similar decision of the Fourth Circuit, *Teledyne Economic Development* v. *NLRB*, 108 F.3d 56 (1997), also upholding the Board's adoption of the *Management Training* rule. Pet. App. 116a.

ARGUMENT

The decision of the court of appeals, upholding the Board's conclusion that petitioner is not statutorily exempt from its jurisdiction as a political subdivision of a State, and also upholding as reasonable the Board's decision to exercise its jurisdiction over petitioner, is correct. That decision does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 19-20) that, under *NLRB* v. *Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), it is a "political subdivision" of the State of Kentucky within the meaning of Section 2(2), and therefore exempt from the Board's jurisdiction. There is no merit to that contention. In *Hawkins County*, the Court concluded that a utility district was a "political subdivision" of the State of Tennessee because it was "administered *by individuals who are responsible to public officials* or to the general electorate." *Id.* at 605-609. The Court noted, among other things, that a state statute

"ma[de] crystal clear that [the utility district] is administered by a Board of Commissioners appointed by an elected county judge, and subject to removal proceedings at the instance of the Governor, the county prosecutor, or private citizens." *Id.* at 605. Other aspects of state law provided that the utility district's proceedings were subject to public records laws, the district had the power of eminent domain, and the district commissioners had the power of subpoena, all of which reinforced the conclusion that the district was a political subdivision rather than a private corporation. *Id.* at 607-609.

The Board's conclusion that petitioner is not a "political subdivision" of the State of Kentucky is fully supported by the record. Unlike the utility district in *Hawkins County*, petitioner's board of directors is not "responsible to public officials or the general electorate." Rather, as the ARD, the ALJ, and the Board found (Pet. App. 28a), "the City has no authority to decide the composition or structure of [petitioner's] board of directors which is, in essence, its policy-making body." Although the City appoints the directors of *the holding company—i.e.*, the Corporation—some of whom also happen to sit on petitioner's board, nothing requires that there be an identity of composition between the board of directors of the holding company and the board of directors of the *hospital*, which is the petitioner here. As the court of appeals found, "[i]n fact, many individual hospital board members who are responsible for administration of [petitioner] have no connection whatsoever with the holding company board of directors or with the Pikeville municipal government." *Id.* at 112a. And although petitioner argues (Pet. 20) that, in effect, its board of directors is

"responsible to public officials" because petitioner is supposedly "subject to the plenary control of the City," the ALJ found (Pet. App. 30a), and the Board agreed (*id.* at 3a), that the City's ostensible control over petitioner's operations was merely a "sha[m] designed solely to defeat the Board's jurisdiction." Those factual findings of the Board raise no issue warranting further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[2]

2. a. Petitioner contends (Pet. 9-19) that the Board's exercise of jurisdiction over it based on *Management Training Corp.*, 317 N.L.R.B. 1355 (1995), is unreasonable and contrary to the National Labor Relations Act. Petitioner is jurisdictionally barred from challenging the validity of the *Manage-*

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[2] Given the Board's findings, upheld by the court, petitioner is incorrect in asserting (Pet. 20) that "it is undisputed that members of Petitioner's Board of Directors are responsible to the elected officials of the City of Pikeville." Nor is petitioner correct in suggesting (*ibid.*) that a City resolution (see Pet. App. 172a-175a), that directed petitioner to amend its articles of incorporation in various ministerial respects compelled a finding that it is a "political subdivision." That resolution does not demonstrate that petitioner's board of directors is "responsible to public officials" in any legally significant sense. Of greater significance is the fact that the City "has no authority to decide the composition or structure of [petitioner's] board of directors." Pet. App. 28a. Cf. *Jefferson County Community Center for Developmental Disabilities, Inc.* v. *NLRB*, 732 F.2d 122, 126 (10th Cir.) (employer not a "political subdivision" where a majority of board of directors was "neither appointed by nor subject to removal by public officials or the general electorate"), cert. denied, 469 U.S. 1086 (1984); *Truman Medical Center* v. *NLRB*, 641 F.2d 570, 573 (8th Cir. 1981) (same conclusion, where 31 of 49 directors were neither appointed nor subject to removal by public officials or general public).

ment Training rule in this Court. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Petitioner did not challenge the *Management Training* rule before the Board; it challenged that standard for the first time in the court of appeals. Petitioner could have raised its challenge before the Board by filing a motion for reconsideration, once the Board issued its decision to assert jurisdiction over petitioner pursuant to *Management Training*. See Pet. App. 2a-3a; 29 C.F.R. 102.48(d)(1). Petitioner has pointed to no "extraordinary circumstances" excusing its failure to raise its claim before the Board. Accordingly, petitioner is jurisdictionally barred by Section 10(e) from asserting its claim in this Court. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

Furthermore, the Board specifically found that assertion of jurisdiction over petitioner was warranted even under its old *Res-Care* standard. Pet. App. 3a. The Board upheld the ALJ's findings that the City Commission's January 14, 1991, resolution purporting to prevent petitioner from negotiating any collective bargaining agreement without its consent was "a sham transaction," and that after passage of the resolution, petitioner "retained sufficient control over essential terms and conditions of employment to enable it to engage in meaningful collective bargaining." *Ibid.* Because the outcome of this case would therefore not have been different even if the

Board had adhered to the standard now championed by petitioner, petitioner's challenge to the *Management Training* standard is academic. And although petitioner argues that the Board lacked jurisdiction over it even under the *Res-Care* standard (Pet. 20-22), the Board's rejection of that argument based on the specific facts of this case raises no important legal issue warranting review by this Court. *Universal Camera, supra.*[3]

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[3] There is no merit to petitioner's argument (Pet. 21) that the Board erred as a matter of law in concluding that the City Commission's resolution was a sham. The Board has authority to disregard "paper arrangements that do not reflect the business realities." *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398, 403 (1960). Although petitioner relies on *Board of Trustees of Memorial Hospital* v. *NLRB*, 624 F.2d 177 (10th Cir. 1980) (see Pet. 12), there the court in fact recognized the Board's authority to examine both the parties' contracts and their actual practices. See 624 F.2d at 185. In that case, the court emphasized that there was "no suggestion" of "devious maneuvers" or "misstated documents," *id.* at 184, whereas in this case the Board found that the City Commission's resolution was a "facade," not intended to increase the degree of the City's actual control over petitioner (Pet. App. 31a). *ARA Services, Inc.* v. *NLRB*, 71 F.3d 129 (4th Cir. 1995), also relied on by petitioner (Pet. 21), did not involve an attempt by a governmental entity to place a private employer beyond the Board's jurisdiction through the promulgation of a resolution found by the Board to have been a mere sham. In that case, the court refused to consider the "historical relationship" between the private and governmental entities, and gave dispositive weight to "the substance of the parties' own agreement," which made the governmental unit ultimately responsible for setting wages and benefits. 71 F.3d at 134. The *ARA* court did not state, however, that arrangements on paper completely at odds with the reality of the relation between a private and a governmental entity must be given controlling weight by the Board.

b. Even if petitioner's claim were properly presented, further review of the Board's *Management Training* standard would not be warranted. The only other court that has addressed the validity of the *Management Training* standard has also upheld it. See *Teledyne Economic Development* v. *NLRB*, 108 F.3d 56, 59 (4th Cir. 1997) ("*Management Training* rule is a permissible exercise of the Board's jurisdiction under the plain language of the [Act]"). And as both courts of appeals have concluded, the Board's decision in *Management Training* is fully consistent with the National Labor Relations Act.

In *Res-Care, Inc.*, 280 N.L.R.B. 670 (1986), the Board held that, where "the scope and degree of control exercised by the exempt entity over the [statutory] employer's labor relations" demonstrated that the statutory employer "does not have the final say on the entire package of employee compensation, i.e., wages and fringe benefits," it would not "effectuate the purposes and policies of the Act" for the Board to assert jurisdiction. *Id.* at 672, 674. Such statutory employers were seen to "lack[] the ability to engage in the necessary 'give and take' which is a central requirement of good-faith bargaining, and which makes bargaining meaningful." *Id.* at 674. But in *Management Training Corporation*, the Board, after reexamining the matter in depth, concluded that "the emphasis in *Res-Care* on control of economic terms and conditions was an oversimplification of the bargaining process." 317 N.L.R.B. at 1357. The Board explained (*ibid.*):

> While economic terms are certainly important aspects of the employment relationship, they are not the only subjects sought to be negotiated

> at the bargaining table. Indeed, monetary terms may not necessarily be the most critical issues between the parties. In times of downsizing, recession, low profits, or when economic growth is uncertain or doubtful * * * the focus of negotiations may be upon such matters as job security, job classifications, employer flexibility in assignments, employee involvement or participation and the like.

Finding that its *Res-Care* decision had been "shortsighted" in "declar[ing] that bargaining is meaningless unless it includes the entire range of economic issues" (317 N.L.R.B. at 1357), the Board held that, "in determining whether the Board should assert jurisdiction, the Board will only consider whether the employer meets the definition of 'employer' under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards." *Id.* at 1358. The Board emphasized, however, that "[t]he [e]mployer in question must * * * control some matters relating to the employment relationship, or else it would not be an employer under the Act." *Ibid.*

c. Petitioner argues principally (Pet. 11-13) that the *Management Training* rule is inconsistent with Section 2(2) of the Act, and that the *Res-Care* standard was compelled by the Act. But as the court of appeals correctly explained, the *Res-Care* standard was not mandated by Section 2(2). Pet. App. 114a-115a. Rather, Section 2(2) "simply and straightforwardly exempts only certain named governmental units and other organizations from the reach of the NLRB." *Id.* at 114a. Private firms that do not retain control over "the entire package of employee

compensation" (*Res-Care*, 280 N.L.R.B. at 674) because of a contractual relationship with an exempt governmental entity do not fall within any of the statutory exemptions. The *Res-Care* test was therefore "only a tool previously used by the Board to define the parameters of the agency's *discretionary*, as opposed to statutory, jurisdiction." Pet. App. 115a; see also *Teledyne*, 108 F.3d at 59; *Human Development Assoc.* v. *NLRB*, 937 F.2d 657, 660 (D.C. Cir. 1991), cert. denied, 503 U.S. 950 (1992); *NLRB* v. *Kemmerer Village, Inc.*, 907 F.2d 661, 663 (7th Cir. 1990).

Nothing in the Act requires the Board to refuse jurisdiction over private entities acting as contractors for the government if those entities meet the statutory definition of an "employer." If an entity does not control at least "some matters relating to the employment relationship," *Management Training*, 317 N.L.R.B. at 1358, then it cannot engage in meaningful collective bargaining, and it is not an "employer" within the meaning of the Act. The Act does not further prohibit the Board from exercising jurisdiction over entities that do meaningfully control aspects of the employment relationship, but may not make the final determination with regard to wages and benefits. "When enacting Section 2(2), Congress was surely aware that private employers contracted with government entities to provide needed goods and services. Congress could not have intended to compel the Board to decline jurisdiction over private employers based on constraints that their government contracts might impose upon the collective bargaining process. If it had so intended, it would have exempted private contractors as well as

governmental entities from the Act." *Teledyne*, 108 F.3d at 59.

The decisions of the courts of appeals cited by petitioner (Pet. 12) do not hold that the Board's *Res-Care* test was compelled by Section 2(2). For example, in *NLRB* v. *Pope Maintenance Corp.*, 573 F.2d 898 (5th Cir. 1978), the court stated that the "jurisdiction of the Board is to be declined if the employer does not retain sufficient control over the employment relationship to engage in meaningful collective bargaining." *Id.* at 902. While that language does indicate that the statutory definition of "employer" requires that the employer be able to engage in meaningful collective bargaining, it does not suggest that meaningful collective bargaining can exist only when the employer retains control over "the entire package of employee compensation" (*Res-Care*, 280 N.L.R.B. at 674).[4] To the contrary, as the Board concluded in *Management Training*,

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[4] Petitioner's reliance on *Board of Trustees of Memorial Hospital* v. *NLRB*, 624 F.2d 177 (10th Cir. 1980), is flawed for the same reason. There, the court stated that, where the employer at issue "does not retain sufficient control over the employment relationship to engage in meaningful collective bargaining, [Section] 2(2) deprives the Board of jurisdiction because the exempt [entity] is deemed the true employer." *Id.* at 185. The court did not hold, however, that "sufficient control * * * to engage in meaningful collective bargaining" (*ibid.*) requires the employer to retain control over "the entire package of employee compensation." Indeed, the Tenth Circuit subsequently stated that "the jurisdictional test does not require that an employer control all terms and conditions of employment, but only that he retain enough control to bargain effectively." *Jefferson County Community Center for Developmental Disabilities, Inc.* v. *NLRB*, 732 F.2d 122, 127, cert. denied, 469 U.S. 1086 (1984).

meaningful collective bargaining can occur in many situations where bargaining can affect important incidents of the employment relationship, albeit not "the entire package." See 317 N.L.R.B. at 1357 (discussing federal-sector collective bargaining); *NLRB* v. *Austin Developmental Center, Inc.*, 606 F.2d 785, 789 n.8 (7th Cir. 1979) (Board "may require collective bargaining even where the employer's relationship to the exempt entity places it under substantial hardships in labor negotiations, as long as it retains some control over terms and conditions of employment").[5]

d. The Board's *Management Training* standard is also consistent with this Court's decision in *NLRB* v. *E.C. Atkins & Co.*, 331 U.S. 398 (1947). The question in *E.C. Atkins* was "whether private plant guards, who are required to be civilian auxiliaries to the military police of the United States Army, are employees within the meaning of [Section] 2(3) of the [Act]." *Id.* at 399. The Court agreed with the Board that the private employer "retained a sufficient residual measure of control over the terms and conditions of employment of the guards so that they might fairly be described as employees of the [private employer]." *Id.* at 412-413 (internal quotation

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[5] Contrary to petitioner's contention (Pet. 11-12), the Board did not hold in prior decisions that Section 2(2) compelled it to adopt its former *Res-Care* test. The Board made clear, in fashioning that test, that it was exercising its discretion to decline to assert jurisdiction over a class of statutory employer. See *Res-Care*, 280 N.L.R.B. at 670 n.1 (issue is "whether, in exercising our discretion, we should decline to assert jurisdiction"); *National Transportation Service, Inc.*, 240 N.L.R.B. 565, 566 (1979) ("right of control" test is a "standard for determining discretionary jurisdictional issues").

marks omitted). The Court did not hold, however, that control over employee wages and benefits is a prerequisite of an employer-employee relationship under the Act; rather, the Court reasoned that such a relationship "may spring as readily from the power to determine the wages and hours of another * * * as from the absolute power to hire and fire or the power to control all the activities of the worker." *Id.* at 413-414. Thus, the Court explained that "where the conditions of the relation are such that the process of collective bargaining may appropriately be utilized as contemplated by the Act, the necessary relationship may be found to be present." *Id.* at 414.

The Board has concluded that collective bargaining may be effectively used when the employer retains the ability to negotiate over some aspects of the employment relationship, albeit not the "entire package of employee compensation," as required by *Res-Care*. That judgment is consistent with the Court's observation in *E.C. Atkins* that an employer-employee relationship under the Act may well arise from sources other than "the power to determine the wages and hours of another" (*id.* at 413), and represents a reasoned judgment based on the policies of the Act. Petitioner posits several hypothetical scenarios (Pet. 15-16) that, it suggests, show that the Board will find an employer guilty of an unfair labor practice for refusing to bargain with the union over employment terms as to which it has no control. In *Management Training*, however, the Board stated that it was "unnecessary to consider specifically the circumstances under which the Board would or would not find that an employer had committed an unfair labor practice by failing to bargain over a matter asserted to be beyond the employer's control."

317 N.L.R.B. at 1359. Should a situation arise in which an entity charged with an unfair labor practice for refusing to bargain with a union maintains that it had no control over the disputed employment terms, the Board will have ample authority to determine whether it would be consistent with the policies of the Act to sustain an unfair labor practice charge in such a situation. No such issue was before the Board in this case, however, as the Union did not charge petitioner with an unlawful refusal to bargain with it, nor does the Board's order require petitioner to bargain with the Union. See Pet. App. 4a, 44a-47a, 98a-101a.

3. Finally, petitioner contends (Pet. 22-25) that, under the Board's procedural rules, the ALJ should not have permitted the relitigation of the jurisdictional issue in the unfair labor practice proceeding because the Board had previously refused to review the ARD's conclusion, in the representation proceeding, that the Board should not exercise its discretion over petitioner under *Res-Care*. That argument rests on a misreading of the relevant rule. The rule in question, 29 C.F.R. 102.67(f), provides that, in a representation case, "[d]enial of a request for review [by the Board] shall * * * preclude relitigating any such issues in any related subsequent unfair labor practice proceeding." As the Board has interpreted that rule, however, it "applies [only] to the *parties*—the employer and the union—and does not preclude the Board from reconsidering its own earlier action." *St. Francis Hospital*, 271 N.L.R.B. 948, 949 (1984). Thus, the Board was not barred from reconsidering its earlier refusal to exercise jurisdiction over petitioner in the representation case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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